This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

**Usage guidelines**

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

**About Google Book Search**

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

Farrand & Co.'s Premium Edition.

# A TREATISE

ON THE

# Law of Awards.

FIRST AMERICAN, FROM THE SECOND LONDON EDITION,
REVISED AND CORRECTED;

*With very considerable additions from printed and manuscript cases:*

AND

## AN APPENDIX,

CONTAINING A VARIETY OF USEFUL PRECEDENTS.

BY STEWART KYD, ESQ.
BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

Fronte exile negotium.—Agressis labor arduus.....TERENCE.
Multum magnorum virorum judicio credo; aliquod et meo vindico.
SENEC.

WITH REFERENCES TO ALL THE RECENT CASES IN ENGLAND AND NOTES UPON REPORTS OF REFEREES IN PENNSYLVANIA.

PHILADELPHIA:
PUBLISHED BY WILLIAM P. FARRAND AND CO.
.....
1808.

## TO THE PUBLIC.

In order to insure correctness the publishers of this book have subjected it to a critical examination, in the following manner—Two proof-sheets have been put up for public examination; one at the publishers' counting-house, the other at the city library in Philadelphia, and a premium of one dollar has been offered for every error that might be discovered: hence it is designated a PREMIUM edition.

DISTRICT OF PENNSYLVANIA, TO WIT:

BE IT REMEMBERED, That on the seventeenth day of December in the thirty-second year of the Independence of the United SEAL. States of America, A. D. 1807. William P. Farrand and Co. of the said District, have deposited in this Office, the title of a book the right whereof they claim as Proprietors, in the words following, to wit:

"Farrand and Co.'s Premium Edition. A Treatise on the Law of "Awards. First American, from the second London edition, revised and "corrected; with very considerable additions from printed and manuscript "cases: and an appendix, containing a variety of useful precedents. By "Stewart Kyd, Esq. Barrister at law, of the Middle Temple.

"Fronte exile negotium.—Aggressis labor arduus.....TERENCE.

"Multum magnorum virorum judicio credo; aliquod et meo vindico. SENEC.

"With references to all the recent cases in England and notes upon "reports of referees in Pennsylvania."

In conformity to the act of the Congress of the United States, intituled, "An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned:" And also to the act, entitled, "An act supplementary to an act, entitled, 'An act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching historical and other prints."

D. CALDWELL,
Clerk of the District of Pennsylvania.

PRINTED BY FRY AND KAMMERER,
Printers of W. P. Farrand & Co.'s premium editions.

TO

JOHN JOSEPH POWELL, Esq.

BARRISTER AT LAW,

OF THE MIDDLE TEMPLE,

THIS ESSAY

IS MOST RESPECTFULLY INSCRIBED,

AS A TESTIMONY OF

THE

HIGH SENSE THE AUTHOR ENTERTAINS

OF

THE HONOUR

OF

His Friendship and good Opinion,

AND OF THE

JUST ESTIMATION IN WHICH HE HOLDS HIS CHARACTER

AS

A LAWYER AND A WRITER.

# ADVERTISEMENT

## TO THE LAST ENGLISH EDITION.

THE present edition of the *Treatise on the Law of Awards* contains a considerable number of cases which have been determined since the publication of the first; and of these several are no where else in print; in some parts the arrangement is somewhat altered; and some subjects are discussed, which in the first edition were left untouched. The APPENDIX of PRECEDENTS is entirely new.

No. 3, Elm-Court, Temple,
August 12, 1799.

---

# ADVERTISEMENT

## TO THE AMERICAN EDITION.

THIS edition, printed page for page from the last English edition of Mr. Kyd's treatise, contains within brackets references to all such cases as have been adjudged in England since its publication there; and in the notes, indicated by Italick letters, the reader will find remarks upon a species of award known to the law of Pennsylvania, and subject to certain peculiar regulations.

January 1808.

# ADDENDUM.

## NOTA BENE.

IN page 139 it is stated that the Court of King's Bench had lately decided that an award under seal must be on a deed stamp, the sealing constituting it a deed. This case was cited before Buller J. at the sittings in last Trinity Term in the Common Pleas, at Westminster, and something said about the *delivery* of an award *under seal* constituting it a deed.—That Judge said he should pay no attention to that decision in the place where he then sat, and that by the delivery must be understood that the arbitrator delivered the instrument as his *award*, not as his *deed*.

I have since been favoured with the following Note by Mr. Serjeant Bailey:—

"WILSON *v.* SMEE.

"IN Hilary Term 1798 I moved for an attachment for nonperformance of an award; Onslow shewed for cause that the award was under seal, that the attestation purported that it had been sealed and delivered, and that it ought to have had a deed stamp: The case stood over for the consideration of the court till Easter Term; and then I produced an affidavit that the arbitrators, at the time they executed their award, used the words 'that they published it as their award,' and that they did not deliver it as their act and deed; and on this affidavit the court thought the stamp proper, and made the rule absolute."

In Styles 459, Dod *v.* Herbert, Glyn J. C. says, "an arbitrament under seal is no DEED, and the arbitrament may be made without a deed, and therefore it is not necessary to be produced in court, for it is but a WRITING under hand and seal;" and in Perry v. Nicholson, 1 Bur. 278. Denison J. page 281, says, "It has been settled that in actions upon AWARDS (which are no *specialties*) there is no occasion to set forth the *whole* award," &c. [4 East, 584. Brown v. Vawser, accordingly.]

# TABLE OF CONTENTS.


Page.

*INDEX to the Cases* - - - - - - - - xii

*Introduction* - - - - - - - - - - 1

*Definitions* - - - - - - - - - - - 6

*Distribution of the Subject* - - - - - - - 6

## CHAPTER I.

SUBMISSION.

*How it shall be* - - - - - - - 8

*Its Extent* - - - - - - - - - 26

*How construed* - - - - - - - - 27

*May be revoked* - - - - - - - 29

*By rule of court in Pennsylvania* - - - 34

## CHAPTER II.

THE PARTIES.

*Who may submit* - - - - - - - 35

*Who shall be bound by an Award* - - - 42

*Who may take Advantage of an Award* - - - 48

## CHAPTER III.

THE SUBJECT OF REFERENCE.

*What Subjects of Controversy may be submitted to Arbitration, and what not* - - - 50

## CHAPTER IV.

THE ARBITRATOR AND UMPIRE.

*Who may be an Arbitrator* - - - - 70
*Investigation of the Cases relative to the Manner and Effect of the Appointment of an Umpire* - - - - - - 75
*Proceedings by Arbitrators* - - - - 95
*How far they may reserve an Authority to themselves* - - - - - - - 121
*How far they may delegate their Authority* - 127

## CHAPTER V.

THE AWARD OR UMPIRAGE.

*The Award must be according to the Submission* 140
*It must not extend beyond the Submission* - 141
*Nor to a Stranger to the Submission* - - 156
*Must not be of Parcel only of the Things submitted* - - - - - - - 171
*Must not be of any Thing against Law* - 184
*Nor of a Thing impossible* - - - - - 185
*It must be reasonable* - - - - - - 189
*advantageous* - - - - - 191
*certain* - - - - - - 194
*When Uncertainty may be helped by Averment* 205
*It must be final* - - - - - - - - 208
*mutual* - - - - - - 218
*How Awards shall be construed* - - - 228
*When an Award, though void for Part, shall be good for the Residue* - - - - - 242
*When void for the whole* - - - - - 246
*The Form of the Award* - - - - - 261
*What shall be Performance* - - - - - 264
*What shall be a Breach* - - - - - 271

## CHAPTER VI.

THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD IS PROPERLY MADE.

*By the Roman Law* - - - - - - 276
*When the Submission is verbal* - - - 277
*When the Submission is by Bond* - - 280
*When by Reference at Nisi Prius* - - 311
*When by Bond according to the Statute* - - 314
*By Bill in Equity* - - - - - - 318
*When by Rule of Court in Pennsylvania* - 326 a

## CHAPTER VII.

THE MEANS OF PROCURING RELIEF AGAINST AN AWARD WHEN IMPROPERLY MADE.

*When the Objection arises on the Face of the Award* - - - - - - - 327
*By Bill in Equity for Corruption, Partiality, or Concealment* - - - - - - 330
*By summary Application to have the Award set aside* - - - - - - - 340
*For what Causes an Award may be set aside* - 346
*How far an Award may be pleaded to a Bill filed to set it aside* - - - - - - 360
*How when award is under Rule of Court in Pennsylvania* - - - - - - 389

## CHAPTER VIII.

*The Effect of the award in precluding the Parties from suing on the original Cause of Action, which was the subject of Reference* - 381

## APPENDIX OF PRECEDENTS.


Common Bond *of Arbitration* - - - - - - 398
Condition *of an Arbitration* - - - - - - 400
Bond *for settling Accounts of Executors, &c.* - - ibid.
Bond *from J. H. to T. H. in the penal sum of* 1000*l.* - 403
Time enlarged *by endorsement* - - - - - 405
Award *made on the foregoing Submission* - - - 406
Bond *from J. S. to R. S. in the penal sum of* 1000*l.* - 412
The Award - - - - - - - - - - 414
The Releases *given by each of the parties in Obedience to the Award* - - - - - - - - - 423
Submission *by Indenture* - - - - - - 424
Award *made by the three Arbitrators on the above Submission* - - - - - - - - - - 427
Rule of Reference *at* Nisi Prius *where a Juror is withdrawn* - - - - - - - - - - 432
*at* Nisi Prius *where a Verdict is taken for the plaintiff* - - - - - 433
Special Reference *by Rule of Court* - - - - - 435
Award *made on the foregoing Submission* - - - 438
Pleadings *on Awards* - - - - - - - 441
Assumpsit *on mutual Promises to perform an Award* - 443
Debt *on an Award for Payment of Money* - - - 446
Declaration *in Debt on an Award made by an Umpire* 448
Debt *on an Award by Umpirage against Defendant, &c. in the Arbitration Bond* - - - - - 451
Declaration *in Debt on an Award, &c. where one of the Arbitrators refused to act* - - - - - - 456
Debt *on Bond, &c.* - - - - - - - - - 460
Plea *to an Action on a Bond of Arbitration* - - 463
*of an Award in Bar of an Action, &c.* - - - 465

**Bill** *to set aside an Award, the Arbitrators having made improper Allowances, &c.* - - - - - - 468
**Bill** *to set aside an Award for Concealment of essential Circumstances, &c.* - - - - - - - 490
**Plea** *of the Defendant J. G.* - - - - - - 514
**Bill** *to set aside an Award for Corruption and Partiality in the Arbitrators* - - - - - - - - 531
**Plea** *of Defendant in whose favour the Award was made, to Part, and his Answer to the Residue of the Bill* - 550
**Index** - - - - - - - - - - - 567

# LIST OF

# THE PRINCIPAL CASES

## CITED IN THIS WORK.


* ABBOT v. Pinchin, 380 a.
Abrahat v. Brandon, 234, 242.
Adams v. Statham, 279.
Adams v. Adams, 88, 236, 240.
Addison v. Gray, 297.
Ainsley v. Goff, 354.
Alablaster v. Clifford, 170.
Alardice v. Cambel, 339.
Alley v. Cox, 190.
Alsop v. Senior, 42.
Althlestone v. Moone, 183.
Ansell v. Evans, 23.
Arnoke v. Orwell, 237.
Arnotte v. Breame, 200.
* Atkison v. Abraham, 346.
* Austin v. Snow's lesse, 34 a.

Backwell v. Knipe, 203.
Badley v. Loveday, 316.
Baily v. Cheesely, 25.
Baldway v. Ouston, 33, 310.
Bamfield v. Bamfield, 301.
Barber v. Giles, 80.
Barker v. Lees, 30.
Barnard v. King, 79.
Barnardiston v. Fowlyer, 148, 272.
Barnes v. Greenwell, 174.
Barney v. Faierchilde, 248.
Barsey v. Clipsham, 159, 188, 200.
Barret v. Fletcher, 292.
Barry v. Rush, 40.
Baspole's Case, 176.
Baspole v. Freeman, 238.
Beale v. Beale, 202.
Bean v. Newbury, 182.
Becket v. Taylor, 159, 189.
Beckingham v. Hunter, 148.
Bedam v. Clerkson, 158, 197, 235, 283.
Bevan v. Bevan, 317.
Berrie v. Perrie, 28.
Bilford v. Flint, 267.
Bird v. Bird, 159.
Birks v. Trippet, 179.
Blake's Case, 51, 53.
Booth v. Garnett, 215, 275.
* Borrowdale v. Hitchner, 314.
Bowyer v. Blorksidge, 39.
Bowyer v. Garland, 48.
Bradley v. Tunstow, 395.
Bretton v. Pratt, 245.
Brown v. Dalton, 125.
Brown v. Marsden, 394.
Brown v. Goodman, 311.
Brown v. Brown, 331.
* Brown v. Vawser, 118.
* Brown v. Scott, 333 a.
Brown v. Savage, 169.
* Buckley v. Durant, 34 b. 326 c. 380 a.
Bullock v. Dulbie, 160.
Burbidge v. Raymond, 226.
Burges v. Pleyer, 263.
Burton v. Ellerton, 373.
Burton v. Petrie, 333.
Bushfield v. Bushfield, 151, 178.
Butcher of Croydon's Case, 358.
Butcher v. Cole, 372.

Butler v. Grubb, 154.
Butler v. Wigge, 26.

Cable v. Rogers, 261.
* Calhouns v. Dunning, 34 b. 63 b. 326 e.
Carter v. Carter, 183.
Carter v. Startut, 129.
Carter v. Mansbridge, 25.
Cayhill v. Fitzgerald, 165.
Champion v. Wenham, 327, 351.
* Chaplin v. Kirwan, 348.
Chapman v. Lansdown, 23.
Chase v. Dare, 82.
* Ching v. Ching, 351.
Clapcott v. Davy, 232, 385.
Clark v. Elwick, 24.
Cockson v. Ogle, 127, 197, 259.
Cole's Case, 221.
Collet v. Powell, 203.
Colston v. Harris, 223, 277.
Colwell v. Child, 46.
Cooper v. Hirst, 227, 231.
Cooper v. Pierce, 242.
Coote v. Pooley, 167.
Copping v. Hurnard, 80, 81, 94.
Cornforth v. Green, 350.
Cowell v. Waller, 90.
Coxal v. Sharpe, 54, 55.

Dalling v. Matchett, 107.
Danes v. Monsay, 87.
Davila v. Almanza, 34.
Dawney v. Vesey, 48.
Delaval v. Maschall, 85.
Dick v. Milligan, 345.
Dighton v. Whiting, 216, 232, 287.
Dilly v. Polhill, 278.
* Dixon's lessee v. Morehead, 34 b. 63 d. 326 d.
* Doe v. Rosser, 63 a.
Dutchess of Suffolk's Case, 71, 108.
Dudley v. Nettleford, 135.
Dudley v. Cole, 382.
* Dunning v. Caruthers, 34 b. 326 d.
Duport v. Wildgoose, 197.

Edmundson v. Hartley, 374.
Elborough v. Yates, 263, 285.
Elliot v. Cheval, 84, 223, 308.
* Emery v. Vase, 350.
Emery v. Emery, 130.
* Evans v. Law, 315.
Ewes v. Blackwall, 326.
Exparte Whitchurch, 42.

* Falconer v. Montgomery, 104.
Farmer v. Durant, 212.
Farrer v. Gate, 300.
Faver v. Bates, 54.
Foreland v. Hornigold, 289, 296, 301.
Fox v. Smith, 297.
Freeland v. Johnson, 375.
Freeman v. Sheene, 272.
Freeman v. Barnard, 383.
Furser v. Prowd, 203.
Fyall v. Varier, 83.

Gartside v. Gartside, 358, 378.
Gill v. Russell, 397.
Glover v. Barrie, 129.
Goddard v. Goddard, 323.
Godfrey v. Godfrey, 191.
Godfrey v. Boucher, 361.
Golightly v. Jellicoe, 180.
Goodman v. Fountain, 238, 277.
Gosse v. Brown, 170, 237.
Gray v. Wicker, 148.
Gray v. Gray, 159, 195, 212, 272.
Green v. Taylor, 31.
Green v. Waring, 149.
Greenhill v. Church, 330.
* Grier v. Grier 159 a.
* Grubb v. Grubb. 34 f.
* Guier v. Guier, 380 m.

* Hagner v. Musgrove, 347.
Hales v. Taylor, 317.
Halfhide v. Fenning, 15.
Hall v. Hardy, 322.
Hall v. Massey, 150.
Hamond v. Hatch, 176.
Hanson v. Liversedge, 185, 202, 262, 291.
Harris v. Paynter, 183.
Harris v. Mitchell, 77.
Harris v. Knipe, 221.

Harrison v. Grundy, 315.
* Hart v. James, 333 b. 380 a.
Hawkins v. Colclough, 177, 212.
Hayes v. Hayes, 12, 45.
Hetley v. Hetley, 101.
Hide v. Petit, 184, 312.
Hingham v. Hassel, 154.
Hinton v. Crane, 263, 268, 292.
Hodson v. Harridge, 299.
Holland v. Helwis, 190.
Holland v. Brooks, 346.
* Hollingsworth v. Leiper, 97, 380 d.
Hopper v. Hacker, 181, 223.
Horton v. Horton, 57.
Hungate's case, 116.
Hunter v. Bennison, 72, 105, 127, 288.
Hurst v. Bambridge, 197.
* Hurst v. Hurst, 380 g.
Hutchins v. Hutchins, 316, 342.
Huys v. Wright, 274.

Ingram v. Webb, 171, 253.

* Jolly v. Blanchard, 380 i.
Jeanes v. Fourthe, 246.
Jenkinson v. Allenson, 262.
* Jenkins v. Law, 315.

Keind v. Carter, 291.
* Kent v. Elstob, 351.
Kill v. Holister, 14.
*Kingston v. Kincaid, 107, 333 b.
Kinge v. Fines, 216.
Kirby v. Pigot, 224.
Knight v. Burton, 61, 211, 212, 234.
Knox v. Simmonds, 138, 313.
Kockhill v. Wetherel, 203.
* Kunckle v. Kunckle, 110, 326 h. 380 e.
Kynaston v. Jones, 239, 252, 256.

Lambard v. Kingsford, 235, 263.
Leak v. Butler.
Lee v. Elkin, 175, 204, 242, 257.
Lerwin v. Hills, 237.
* Levezey v. Gorgas, 134, 326 e.
* Lee v. Lingard, 314.
* Lowndes v. Lowndes, 342.
Ley v. Paynes, 178, 252.
Linfield v. Ferne, 202, 203.
Lingood v. Croucher, 366.
Lingood v. Eade, 134, 371.
Linnen v. Williamson, 231.
Linsey v. Ashton, 189, 309.
Lonsdale v. Littledale, 333, 339.
Lumley v. Hutton, 47, 54, 55, 78, 198, 286.
Lush v. Crabbe, 81.
Lynch v. Clemence, 163.

Markham v. Jennings, 58, 229, 248.
Marks v. Marriot, 59, 241, 257.
Massey v. Aubrey, 196.
Matthew v. Ollerton, 72.
* Maybin v. Coulon, 185 a.
Maye v. Samuel, 178, 222, 224, 239.
Messenger v. Freeman, 202.
Michel v. Harris, 16, 86.
Middleton v. Weeks, 176, 181, 300.
* Milne v. Gratrix, 34.
Milwood v. Stokes, 213.
Moor v. Bedel, 170.
Morgan v. Mather, 343.
Morris v. Creech, 55.
Morris v. Reynolds, 340.
Morse v. Surry, 47.
Mudy v. Osam, 42.

Newgate v. Degelder, 32.
Nichols v. Grunnion, 208, 222.
Nicklas v. Thomas, 151.
Noble v. Harris, 33.
Norton v. Mansell, 320.
Norwich v. Norwich, 160.
Nutt v. Long, 135, 136.

Onyons v. Cheese, 160.
Ormlade v. Coke, 176, 223, 277.
Osborn v. Roydon, 104.
Owdy v. Gibbons, 12.
Owen v. Hurd, 316, 317.
* Oxley v. Olden, 34 e.

Parmort v. Griffina, 13.
* Passmore v. Pettit, 104 b. 349.
Paterson v. Gross, 315.

Pearson v. Henry, 41.
* Pedley v. Westmacot, 25, 315.
Pedley v. Goddard, 342.
Perry v. Nicholson, 289,
Perryn v. Barry, 245.
Philips v. Knightley, 205, 215.
Philips v. Lord Falkland, 67.
Pickering v. Watson, 239.
* Pigot v. Young, 34 f.
Pinckney v. Bullock, 152, 245.
Pinkney v. Hall, 261.
* Pollock v. Hall, 34 f.
Poole v. Pipe, 319.
Pope v. Brett, 194, 206, 382.
Pope v. Bush, 373.
Preston v. Eastwood, 139.
* Pringle v. M'Clenachan, 380 g.
Purslow v. Baily, 144.
* Purdy v. Delavan, 44, 212, 228.
Pusey v. Desbouvrie, 364.

* Randall v. Randall, 176.
Ravee v. Farmer, 138, 181.
Raymond v. Popley, 222.
Rees v. Phelps, 241.
Rex v. Hammerton, 182.
Rex v. Coombs, 65.
—— v. Rant, 65.
Reynolds v. Gray, 94.
Richardson v. Chancey, 315.
Ridout v. Pain, 350.
Risden v. Inglet, 301.
* Rivers v. Walker, 98.
Roberts v. Newbold, 39.
Roberts v Marriot, 145.
Rodham v. Stroher, 294.
Rosse v. Hodges, 202, 266, 303.
Rous v. Lun, 202, 262.
Routh v. Peach, 376, 377.
Royston v. Ryall, 123.
Rudd v. Coe, 25.
Rudston v. Yates, 36, 39.
Russel v. Williams, 392.
* Ruston v. Dunwoody, 34 e.

S. S. Company v. Bumpstead, 350, 357, 363.
Sallows v. Girling, 28, 173, 284.
Salmon v. Pitt, 245.
Samon's Case, 128, 156, 195.
Sayer v. Sayer, 244.
Scott v. Wray, 323.
* Scott v. M'Laughlin, 155.
Selby v. Russel, 121, 216.
Shelf v. Baily, 164.
* Shewell v. Wykoff, 380.
Shephard v. Brand, 135.
* Shephard v. Watrous, 185.
Sherry v. Richardson, 29, 217, 218.
* Shippen's lessee v. Bush, 34 d.
Smith v. Kirfoot, 277, 288.
* Somers v. Balabrega, 34 d. 45.
Soulsby v. Hodgson, 105.
Sower v. Bradfield, 52.
Spettique v. Carpenter, 348.
Squire v. Greville, 11, 211, 242.
Stain v. Wild, 255.
* Sterrett v. Chambers, 34 f.
Stiles v. Triste, 231.
Stock v. De Smith, 316.
Stone v. Knight, 38.
Strangford v. Green, 42, 221.
* Street v. Rigby, 20, 380 m.
Strike v. Bensley, 307.
Strong v. Saunders, 295.
* Stuart v. Ralston, 326 h.
Sweet v. Hole, 271.
Swinglehurst v. Altham, 155.

Tasker v. Keary, 102.
Taverner v. Skingley, 189.
Taylor v. Waltam, 148.

Thinne v. Rigby, 123, 197.
Thomlinson v. Ariskin, 135, 216, 389.
* Thompson v. Charnock, 20.
Tipping v. Smith, 197, 211.
Tittenson v. Peat, 350, 371.
Toll v. Dawson, 235.
Tomkins v. Webb, 244.
Trippet v. Eyre, 91.
Trusloe v. Asewre, 62.
* Trustees, &c. v. Paul, 380 m.
Twissleton v. Travers, 83.

Vanlore v. Tribb, 170, 239, 250.
Vasque v. Daniel, 239.
Veal v. Warner, 304.

Vynior's Case, 32.

Waller v. King, 100, 330.
* Walker v. Frobisher, 346.
Ward v. Periam, 336.
Ward v. Umvin, 178.
Warren v. Green, 168.
Waters v. Bridges, 146, 249, 295.
Watson v. Clement, 84.
Watson v. Watson, 206.
* Watson v. M'Cullum, 65.
Webster v. Bishop, 315, 318.
* Weed v. Ellis, 44, 227.
Wellington v. Mackintosh, 14.
Wharley v. Beckwith, 123.
* Williams v. Craig, 34 c. 326 d. 380 d.
Wills v. Maccormick, 328.
Wilson v. Constable, 262, 284.
Winch v. Saunders, 247.
Winter v. Garlick, 135.
Withers v. Drew, 137, 206.
* Woglam v. Adams, 245.
Wood v. Thomson, 44.
Wood v. Ardist, 117.
Woodbridge v. Hilton, 343.

* Young v. Reuben, 333.

A

# TREATISE

ON

# The Law of Awards.

## INTRODUCTION.

IN the progress of society, a considerable time elapses, after the ideas of property, and of the exclusive rights of the individual, have arisen in the minds of men, before a compulsory system of distributive justice can be completely established. During that unsettled period, every dispute, for the decision of which the passions of the disputants do not prompt them to appeal to the chance of arms, is terminated either by a mutual agreement, the conditions of which are settled by themselves, or by the intervention of their friends; or by a reference to some indifferent person, of whose superior wisdom and equity they have formed a favourable opinion. In the first mode of settlement, the security which each party has for performance by the other, arises partly from the nature of the agreement, which consists perhaps of mutual concessions to be made at the same time, partly from the fear of mutual

violence in the case of refusal, and partly from that sense of honour and respect for the opinion of others, which in every period of society has a considerable influence over the mind. In the other mode, by reference, beside these principles, which are equally applicable to this as to the first case, there is an additional security, arising from the opinion which the contending parties entertain of the justice of the arbitrator. It must soon have been found, however, that something more than all these was wanting to procure a ready and uniform obedience to the judge; and it became necessary to arm him with the collective power of the society, to enable him to enforce the execution of his decrees.— Yet after the multiplied concerns, and the complicated rights of men, had rendered the science of law a distinct profession, and courts with a regular course of proceeding were established, many reasons concurred, in many cases, to induce contending parties still to have recourse to the original mode of reference, to a domestic judge chosen by their mutual consent.

Under whatever system of law regular courts for the distribution of justice are erected, it is found necessary, in order to give certainty to their decisions, to adapt peculiar forms of action, and modes of pleading, to the particular nature of the case, and to establish certain formalities in the manner of bringing the parties before the court. The consideration of expence, that must necessarily be incurred before a hearing can be obtained, and a fear that a technical mistake in some part of the proceedings may endanger the party's success, often prevail with him, though satisfied of the justice of his cause, to refer it to the decision of an indifferent person, before whom he may explain every

circumstance, without the apprehension of failing from ignorance of form. An action, too, can seldom decide more than a single question; but the variety of transactions, which, from the nature of improved society, must frequently have place between contending parties, requires a tribunal which can completely investigate the whole, set one claim or one injury against another, and pronounce such a sentence as will put an end at once to all their disputes. All courts have found it necessary to establish particular modes of proof, and certain rules of evidence; and one, amongst the latter, which is founded in the first principles of justice and public policy, "that no man shall be permitted to give evidence in his own cause." But this rule, like many others founded on general principles, and established for general convenience, is sometimes productive of particular hardship. From the nature of the transaction itself, perhaps; from the length of time that may have elapsed since it took place; from the want of precaution in the parties to have their agreement witnessed, or reduced into writing at the time; and from many other circumstances, it may frequently happen, that either there is no other evidence than the testimony of the parties themselves, or what there is without these may be very insufficient to enable a public tribunal to draw a positive and certain conclusion. In such a case, a judge, who can examine the parties to the transaction, who can observe their looks and demeanour, and who, without being confined to the strict rules of evidence, is at liberty to decide from circumstances of probability, has manifestly a singular advantage. A conviction of the good policy of encouraging these domestic tribunals, has induced those who have pre-

sided over the formation of the civil code, to lend them their assistance to enforce obedience to their decrees: that assistance, however, is not given indiscriminately in all cases, without examining into the propriety and justice of the award; it has been thought proper to establish rules of interpretation, derived from the nature of the authority conferred upon the arbitrators, and the implied engagement under which the contending parties bind themselves by their submission: accordingly we find, that the title AWARDS makes no inconsiderable figure in almost every system of law with which we are acquainted. The rules which have been established with respect to awards, in the English law, in their general spirit and fundamental principles, bear such a resemblance to those which are found in the pandect and code of Justinian,[1] that there can be little doubt that the latter are the source from whence the former sprung. By what slow gradations the greater number of them were first received into the Roman law, it is impossible now to discover, as they are given as acknowledged and long established rules at the time when the pandect and code were compiled: nor is it more easy to say, at what precise period they were adopted here, or whether they were admitted at once, or by degrees, as a component part of our judicial system. In the most ancient repositories[2] of the decisions of our courts, the greater part of them are mentioned as known and uncontroverted law. It is chiefly in the application of them to particular cases, and with respect to the manner in which effect shall be given to them, by pleading or otherwise, that they have been the subject of litigation for many centuries past.

[1] Ff. l. 4. t. 8. Cod. l. 2. t. 56. [2] Year Books.

Under each head into which the subject of awards naturally divides itself, it is proposed, not barely to lay down the law as it is received at the present day, but as far as the determinations of the courts on that subject, which have been preserved in the books of reports, will permit, to trace the variations of opinion which have at different periods taken place, and the grounds on which every question has been at last decided. In the execution of this plan it may sometimes perhaps be necessary to detail a series of technical subtleties, which, some may think, might as well have been omitted: to those, however, who consider that, in every system, few laws owe their existence to legislative wisdom, contemplating the possible relations and general interests of society, and providing at once, by a positive edict, a solution for every question to which the various transactions of men with each other might in a series of ages give birth, but that by far the greatest number have been established as each particular question has arisen; that the passions of the client have a tendency to influence the mind of the advocate, and that the advocate is often ready to assist the client in repelling the claim of his opponent, by all the subtleties with which his professional pursuits have armed him— To such readers this detail will probably appear the least faulty part of the work.

## DEFINITIONS.

THAT act, by which parties refer any matter in dispute between them to the decision of a third person, is called a submission; the person to whom the reference is made, an arbitrator; when the reference is made to more than one, and provision made, that in case they shall disagree, another shall decide, that other is called an umpire; the judgment pronounced by an arbitrator, or arbitrators, an award; that by an umpire, an umpirage, or, less properly, an award.[3]

## DISTRIBUTION OF THE SUBJECT.

THE most natural distribution of the subject seems to be under the following heads:

I. The Submission.
II. The Parties to it.
III. The Subject of Reference.
IV. The Arbitrator and Umpire.
V. The Award, or Umpirage.

[3] Domat. 1 vol. 223.

VI. The Remedy to compel Performance, when the Award or Umpirage is properly made.

VII. The Means of procuring Relief against it when improperly made.

VIII. And, lastly, its Effect in precluding the Parties from suing on the original Cause of Action, which was the Subject of Reference.

# CHAPTER I.

## THE SUBMISSION.

*How it shall be.* THE Submission may be purely by the act of the parties themselves; or it may be by their act with the interposition of a court.

In the ancient Roman law, whether the submission was made in the one or the other of these ways, there was no complete remedy for non-performance, unless the parties bound themselves reciprocally, either to perform what should be awarded, or to incur the forfeiture of a sum of money, or of some other specific thing;[4] except in the case where the parties were mutual debtors, and they promised mutually that he who did not obey the award should not sue for what

[4] Ex compromisso placet exceptionem non nasci, sed pœnæ petitionem. Ff. l. 4. t. 8. s. 2.—Tametsi neminem prætor cogat arbitrium recipere—tamen ubi semel quis in se receperit arbitrium—quisquamne potest negare æquissimum fore prætorem interponere, ut officium quod in se recepit, impleret? Ait prætor, "Qui arbitrium, pecuniâ compromissâ receperit." l. 4. t. 8. s. 3. n. 1, 2.—Arbitrum autem cogendum non esse sententiam dicere, nisi compromissum intervenerit. Quod ait prætor, "Pecuniam compromissam:" accipere nos debemus, non si utrimque pœna *nummaria*, sed si et *alia* res vice pœnæ, si quis arbitri sententiæ non steterit, promissa sit. s. 11, n. 1, 2.

was due to him, which was in substance the same thing as a submission under a penalty.[4]

Justinian, however, in some measure, though very inadequately, provided for the case of a submission with a simple promise to stand to the award. He enacted, that whether such a submission was verbal or in writing, then if the parties, after the award made, subscribed that the judgment did not displease them; or if, within ten days, they did not expressly declare they were dissatisfied with it, each should have a remedy against the other, in case of non-performance.[5] And where the submission was accompanied by an oath to stand to the award; or the arbitrator, by the consent of the

[4] Interdum——recte *nudo pacto* fiet compromissum: ut puta, si ambo debitores fuerunt, et pacti sunt "ne petat quod sibi debetur, qui sententiæ arbitri non steterit." 11, n. 3.

[5] Si quis presens arbitrum, sententiam dicere prohibuit, pœna committetur. Sed si pœna non fuisset adjecta compromisso, sed simpliciter "sententiæ stari" quis promiserit: incerti versus eum foret actio. Ff. lib. 4, t. 8, s. 27, n. 6, 7.—Cùm antea sancitum fuerat in arbitris eligendis; quos neque pœna compromissi vallabat, neque judex dederat, sed nulla sententia præcedente communis electio, "ut illorum sententiæ staretur," procreabat —nihil ex eo procedere præsidii: sancimus in eos arbitros—ut eorum definitioni stetur, siquidem subscripserint,—"quod non displiceat ambabus partibus eorum sententia:" non solum reo exceptionem veluti pacti generari, sed etiam actori in factum actionem. Sin autem post sententiam minime, quidem subscripserint, "se arbitri formam amplecti," sed silentio eam roboraverint et non intra decem dies proximos attestatio missa fuerit —per quam manifestum fiat definitionem non esse amplectendam; tunc silentio partium sententiam roboratam esse, et fugienti exceptionem, et agenti memoratam actionem competere. Cod. l. 2, t. 56, s. 5.

parties, bound himself by an oath to end the dispute with all regard to truth, the same emperor enacted, that both parties should be bound.[6]

In the law of England, where the submission is by the bare act of the parties, without the intervention of a court, it may be either verbal or in writing: where it is merely verbal, it may be simply an agreement to submit the matters in dispute to the decision of the arbitrator, without an express promise to perform the award; it may be accompanied by such a promise without the mention of any consideration for it; or it may be with such a promise, on a certain consideration: in all these cases, however, the effect is now the same; but the distinctions were formerly held to be material. At all times a submission, in any of the forms, was held

[6] Si inter actorem et reum nec non ipsum judicem fuerit consensum, ut cum sacramenti religione lis procedat, et litigatores hoc suis manibus vel per publicas personas scripserint, vel—propria voce deposuerint, quod sacramentis præstitis arbiter electus est, hoc etiam additio, "quod et ipse arbiter juramentum præstiterit super lite cum omni veritate dirimendâ—:" vel si de arbitro nihil tale fuerit compositum vel scriptum, ipsæ autem partes literis manifestaverint, quod juramenti nexibus se illigaverint, ut arbitri sententiæ stetur—sive ab initio hoc fuerit ab his scriptum, vel præfato modo depositum dum arbiter eligebatur, sive post definitivam sententiam hoc scriptum inveniatur, "Quod cum sacramenti religione ejus audientiam amplexi sunt:" vel "Quod ea quæ statuta sunt, adimplere juraverint."—Sed et si ipse solus arbiter, hoc litigatoribus poscentibus——præstiterit juramentum, "Quod cum omni veritate liti libramenta imponat." —In his omnibus casibus liceat vel in factum, vel conditionem ex lege, vel in rem utilem instituere actionem, secundum quod facti qualitas postulaverit. Cod. l. 2, t. 56, s. 4.

sufficient to maintain an action on the award, if it was only for the payment of money: but if the award was of any collateral act, there was no means of compelling performance.[7] It was however held, at a very early period, that if the parties "promised" to one another, on consideration of any sum, however trifling, to perform the award, an action might be maintained on such promise, though the award was of something else than the payment of money.[8] The next step was to support an action on such an award, where the submission was by mutual promises only.[9] It was somewhat later before the very act of submission was considered as implying a promise in itself to abide by the determination of the person to whom the matter was referred; and that an action might in all cases be supported on such a submission.[1]

Though the submission may be by parol, yet, when it is reduced into writing, it must, according to a late decision of the Court of King's Bench, be on paper suitably stamped.[2]

When the submission is in writing, it is most commonly by mutual bonds, given by the parties each to

[7] Per Holt, 1 L. Raymond, 248.

[8] Gouldsborough, 92, pl. 4.

[9] 1 Ld. Raymond, 122.—Squire v. Greville, 6 Mod. 35. 2 Ld. Raymond, 961, 965. Vid. 6 Mod. 222. 2 Ld. Raymond, 1039. 1 Salk. 76.

[1] Vid. Knox v. Simmonds, 3 Br. 259, 361.

[2] That is, if the submission be in the form of a simple agreement, the stamp must be an agreement stamp; if by indenture with mutual covenants, a deed stamp—I do not find the case reported in which this was decided, nor do I recollect the name of it; but I was in Court when the point was decided.

the other, in a certain sum penal, on condition to be void on performance of the award; but it is not essentially necessary that they should be so given; they may be given to a third person, or even to the arbitrator himself:[3] and they may be given by other persons than the parties themselves, who will incur the forfeiture if the parties do not perform the award.

Nor is it necessary that, on each of the bonds, it should appear of how many persons the parties to the submission consist. Thus, where[4] it appeared that there were three brothers, Richard, Robert, and William; that their father had devised certain lands to the two latter, and that several disputes arising between them and Richard, they had, by bond, submitted to arbitration; Richard entering into a bond to Robert and William jointly, but they giving him separate bonds: it was held, after several arguments on an action brought by Richard against Robert, that the submission was properly made.

The submission may also be by indenture with mutual covenants to stand to the award.[5]

It is usual, in articles of copartnership, and not uncommon in other agreements, to insert a provision or covenant, that all disputes arising between the parties relative to their intended transactions, or to any covenant in the articles, shall be referred to arbitration. Whether such a provision shall so far have the effect of a submission as to be a bar to either of the parties

[3] Vid. 36 H. VI. 8. 22 Ed. IV. 25 a. Owdy v. Gibbons, Comb. 100.

[4] Hayes v. Hayes, Cro. Car. 433.

[5] 2 Mod. 73.

suing the other on any matter within the terms or meaning of it, without having first had an actual reference, which has proved ineffectual, or a proposal by the plaintiff, to refer, and refusal by the defendant, has been the subject of contrary decisions.

In an early case[6] on this subject the question seems not so much to have been whether such a plea, if properly applied, would have been valid, but whether it clearly appeared that the subject of controversy fell within the meaning of the covenant to refer.—In an indenture containing several covenants there was a proviso that if any misunderstanding or controversy should arise in future by reason of any clause, article, or other agreement in the indenture contained, that then before any suit should be attempted, the parties should choose arbitrators for the determination of the dispute. A bond was also given for the performance of covenants contained in the indenture: the defendant being sued on this bond pleaded this proviso, and alleged that the dispute and controversy, on which the action was brought, arose on the indenture. The court held the plea was defective, because it did not specially shew on what particular article the controversy arose, and enable them to judge whether the matter was the proper subject of reference within the meaning of the indenture. They also held, that the words of this proviso did not extend to bind the parties to submit the "breach" of every covenant or article in the indenture, but were confined to the case where a dispute arose on the "construction" of any covenant.

[6] Parmort v. Griffins, 1 Leon. 37.

But in a later case it was expressly decided, that such an agreement could not alone exclude the jurisdiction of a court of law. An action was brought on a policy of insurance, in which a clause was inserted, that in case of any loss or dispute about the policy, it should be referred to arbitration. The plaintiff in his declaration averred that there had been no reference; on the trial at Guildhall, it was reserved for the consideration of the Court of King's Bench, whether the action could be maintained before a reference had taken place; and the whole court were of opinion, that if there had been a reference depending, or a reference had taken place and been determined, this might have been a bar to the action, but that the mere agreement of the parties could not exclude the jurisdiction of the Court.[7]

[8] To a bill filed for discovery and relief against frauds, the defendant pleaded, that the plaintiff and he had, on the 15th of November, 1728, executed articles of copartnership, by which they had covenanted to become joint traders, as Blackwell-hall factors, for eight years, and agreed that in case any difference should arise relating to their business, or with respect to any covenant in the articles, it should be referred: and averred that all matters in the plaintiff's bill related only to the partnership, and that they had never been submitted to arbitration, nor had the plaintiff ever proposed a reference, or nominated any person to be an arbitrator, though the defendant had offered and was always ready to submit all matters to arbitration.

[7] Kill v. Hollister, 1 Wils. 129.

[8] Wellington v. Mackintosh, 2 Atk. 585 (569).

Lord Hardwicke is reported to have disallowed the plea, not because he thought that an agreement of this kind could not be pleaded, but because there was no power in the present instance given to the arbitrators to examine the parties, as well as witnesses, upon oath. The bill was to obtain discovery and relief against frauds, impositions, and concealments, which, without such a power, the arbitrators could not examine. If the plea were to be allowed as to the relief, therefore, it could not as to the discovery, and it was beneath the dignity of the court to admit a discovery, in order to assist the arbitrators.

In a subsequent case, also of a bill for discovery and relief, where a similar plea was pleaded, the [9]Master of the Rolls asserted that this opinion of Lord Hardwicke's must have been misreported, because the parties could not give the arbitrators such a power. There could be no doubt, he said, that the parties entering into an agreement that all disputes should be referred to arbitration, were bound by such agreement. If it had been actually referred, and the arbitrators had found the examination of the parties insufficient, they would have declined to determine, and then the jurisdiction of the court would have been restored; this was an answer to the objection that the plea should not go to the discovery. If it had become necessary for the information of the arbitrators, that there should be a discovery, the bill ought to have stated that fact: the first appeal must be to those judges pointed out by the articles; if they could not determine the controversy, they would remit it to the court.

[9] Kenyon. Halfhide v. Fenning, 2 Brown, 336.

But in a later case, the doctrine, "that the bill ought to state that it had become necessary for the information of arbitrators that there should be a discovery," has been over-ruled; and it has been decided that, notwithstanding such a clause in articles of agreement, a bill will lie to obtain a *discovery* for the purpose of enabling the plaintiff to support an action at law.

The plaintiffs,[1] as partners in the Cornish Copper Company, in the business of *smelting* copper ore, filed their bill against the defendants as partners in the Cornish *Metal* Company, merely praying a discovery, and stating that by articles of agreement made between the defendants on behalf of themselves and the rest of the Cornish *Metal* Company on the one part, and several other persons, and the plaintiffs in the Cornish *Copper* Company, on the other, the defendants had agreed from time to time during the term of seven years to deliver to the *Smelting* Company a certain share of all the copper ore which should be procured or purchased by the defendants in the county of Cornwall, in certain specific proportions, that the plaintiffs should smelt it, and dispose of it in the manner described, and that the defendants should pay for it, at the usual times, the customary allowance being first made in the manner particularly described,—and that no copper should be delivered by the defendants for the purpose of being manufactured by any person whomsoever other than the *Smelting* Company.—The bill further stated that the defendants having entered into partnership, or into some contract with one Thomas Williams, who was then concerned in smelting and manufacturing copper

[1] Michel and others v. Harris and others, 4 Browne, 311.

[2] Yez. Jun. 129.

ore and copper, had discontinued delivering copper ore to the plaintiffs, and had delivered large quantities to the account of Williams, to the great detriment of the plaintiffs, and in direct violation of the agreement.—The bill particularly charged that the defendants ought to *discover* the several transactions between them and Williams, respecting the delivering and manufacturing of such copper ore and copper, and the quantity of copper ore so by them had and purchased during the time mentioned, and smelted and manufactured at other works and mills than those of the plaintiffs, and the value and amount of the profits, which would have arisen to them, had they been permitted to smelt and manufacture their proper shares, according to the articles of agreement.—The bill likewise charged that the defendants had in their custody several books, papers, accounts, writings, or letters respecting such matters, and tending to shew that some such agreement, as alleged, existed between them and Williams, and that from these it would appear that the defendants had sold very large quantities of copper ore obtained within the county of Cornwall, and had procured it to be smelted and manufactured at other mills than those belonging to the plaintiffs, and that without such a discovery the plaintiffs were totally unable to proceed at law against the defendants to recover a compensation for such breaches of the agreement.

The defendants pleaded that by the articles of agreement mentioned in the bill, it was agreed that in case any variance or dispute should at any time thereafter arise between the parties, respecting the construction of any of the clauses therein contained, or any of their dealings, or transactions, under the said

articles, or in consequence of such dealings and transactions, such variance or dispute should be referred to arbitration in the manner particularly set forth; and they averred that all the several matters respecting which the plaintiffs sought a discovery related to the construction of clauses in the said articles of agreement, or dealings and transactions of the plaintiffs or defendants under them, or in consequence of them, and therefore they pleaded this clause in bar to the discovery sought. —The counsel who argued in support of the plea, contended that the plaintiffs had not by their bill sufficiently and clearly stated the absolute necessity of a discovery of the several matters, so as to proceed to a reference to arbitrators; that the averment of the clause was sufficient to support the plea; that the matters in dispute might be determined by the award of arbitrators, without resorting to law; and that therefore the plaintiffs were not entitled to the aid of a court of equity for the purpose of a discovery to enable them to proceed in an action; and they relied on the authority of the case of Halfhide and Fenning.[1]

The counsel for the plaintiffs contended that the plea was bad in form and in substance; it merely alleged that the parties were bound by contract to settle matters in dispute by arbitration; and that it ought to have alleged a *submission* to arbitration and a reference depending: The authority of the case of Halfhide and Fenning, they said, was much doubted; but if it were ever so decisive, no reliance could be had on it in the present case, from which it was very different, as the bill there prayed relief as well as discovery. As to the substance, the plea did not meet the

[1] Ante, p. 15.

case made by the bill, which was founded on certain frauds committed by the defendants, which were out of the reach of the articles. It would be impossible, they said, for arbitrators to do justice, for the bill sought a discovery of papers and writings in the possession of the defendants, which, without the aid of a court of equity they could not be compelled to disclose, so that justice would be completely evaded, if the plea were allowed: The case of Wellington and Mackintosh, they said, was precisely in point; that Lord Hardwicke had held the plea in that case to be no bar to the *discovery*, and that he had over-ruled it on this ground appeared by the statement in the register's book: They said further that such a plea would not avail at law, unless there had been an actual reference, in support of which they urged the authority of the case of Kill and Hollister before mentioned.[3]

The Lord Chancellor[4] observed, that in the cases at law, scarce a hint occurred, where an agreement of this nature had been set up as a bar to the action; but on the other hand, many authorities were to be found, that the award itself, or the submission to an award, might be pleaded; and on such a plea, the Court examined the award.—In the present case, the bill did not state that the parties were unable to proceed before the arbitrators, and that they could not have the effect of this covenant in the articles respecting the reference, for want of a discovery; but taking no notice of that clause, it stated a variety of circumstances, in which the defendants had violated the articles of agreement,

[3] Vide ante, page 14. [4] Loughborough.

and committed fraudulent acts and concealments on their part, to the detriment of the plaintiffs, and called for a discovery, not for the purpose of going before arbitrators, but in aid of an action at law.—It had been objected, that the parties having entered into a covenant to refer matters in dispute to arbitration, this court ought not to aid such an action, and that the covenant would be a plea to an action at law; and that, therefore, it would be nugatory for this court, by compelling a discovery, to lend its aid to an action, which must be completely barred by such a plea.—He could not adopt this opinion.—In the case before Lord Hardwicke, relief as well as discovery was prayed; it was a singular case, and whatever reason the reporter had inserted as his Lordship's ground of decision, the plea was over-ruled, and agreed with the case at law which had been cited.[5] Had the parties proceeded to a reference, and an award had been actually made, the award might still have been examined, or impeached in this court on equitable grounds.—The present was a case where no reference had been made, and where the bill merely sought a discovery in order to aid the parties in proceeding at law, and the plea was in truth a plea to the action, and unless it could hold as a bar to the action itself, it could not prevail here; and on this ground the plea must be over-ruled.[6]

And parties cannot be precluded from pursuing their right in the ordinary course, by any restriction laid

[5] Kill v. Hollister, 1 Wils. 129.

[6] The Reporter, in a note, says, "a plea of this nature was over-ruled in the Exchequer, in Satterly v. Robinson, Dec. 17, 1791." [8 T. R. 139. Thompson and another v. Charnock, 6 Vez. jun. 815. Street v. Rigby.]

upon them by another from whom they derive their title to the subject in dispute:[7] as if a testator direct, that whatever controversies shall arise on the construction of his will, they shall be decided by such and such arbitrators; the legatees, or parties claiming under the will, may, notwithstanding, have them decided at law, if they think proper.

All the cases of awards, reported in the books for a long series of years, appear to have been made on submissions, by one or other of these methods, by the act of the parties only; but when mercantile transactions came to be frequently the subject of discussion in the courts, it was soon found that a judge and a jury were very unfit to unravel a long and intricate account, and it therefore became a practice, in cases of that kind, and others which seemed to be proper for the same tribunal, to refer the matters, by consent of parties, under a rule of *nisi prius*, which was afterwards made a rule of that court out of which the record proceeded, and performance of the award was enforced by process of contempt. This practice does not appear to have begun before the reign of Charles II. for the reports of that period shew, that it was not before the latter end of that reign that the courts granted their interposition without reluctance; and in more instances than one a judge is stated to have said, that these references were but newly introduced, and he never knew any good to arise from them. But their utility was so well felt a short time afterwards, that, in the reign of William III. in imitation of them a statute[8]

[7] Dict. per Powys J. 10 Mod. 59.

[8] 9 and 10 W. III. c. 15, s. 1.

was made, reciting, that 'It had been found, by ex-
'perience, that references, made by the rule of court,
'had contributed much to the ease of the subject, in
'determining controversies; because the parties became
'thereby obliged to submit to the award of the arbi-
'trators, under the penalty of imprisonment for their
'contempt, in case they refused submission; and
"enacting," 'for promoting trade, and rendering the
'awards of arbitrators the more effectual in all cases,
'for the final determination of controversies referred to
'them by merchants and traders, or others, concerning
'matters of account or trade, or other matters, "That
"it shall and may be lawful for all merchants and
"traders, and others, desiring to end any controversy,
"suit, or quarrel, controversies, suits, or quarrels, for
"which there is no other remedy but by personal
"action or suit in equity, by arbitration, *to agree that*
"*their submission of their suit to the award or umpirage of*
"*any person or persons, should be made a rule of any of his*
"*Majesty's courts of record which the parties shall choose,*
"and to insert such their agreement in their submission,
"or the condition of the *bond* or *promise*, whereby they
"oblige themselves respectively to submit to the award
"or umpirage of any person or persons; which agree-
"ment being so made and inserted in their *submission* or
"*promise*, or *condition of their respective bonds*, shall or
"may, upon producing an affidavit thereof, made by
"the witnesses thereunto, or any one of them, in the
"court of which the same is agreed to be made a rule
"of court, and reading and filing the said affidavit in
"court, be entered of record in such court, and a rule
"shall thereupon be made by the said court, that the
"parties shall submit to, and finally be concluded by

" the arbitration or umpirage which shall be made " concerning them, by the arbitrators or umpire, pur- " suant to such submission; and in case of disobedience " to such arbitration or umpirage, the party neglecting " or refusing to perform and execute the same, or any " part thereof, shall be subject to all the penalties of " contemning a rule of court, when he is a suitor or " defendant in such court; and the court, on motion, " shall issue process accordingly."

It has been lately decided by the Court of King's Bench that an award made under a verbal agreement to refer, is not within the meaning of this statute, and in such a case they refused, though both parties consented, to make a submission a rule of court; alleging that the statute, requiring the agreement to be *inserted* in the submission, did not extend to it.[9]

Where parties have come to trial in a cause depending in one court, they may submit to arbitration, and agree that their submission shall be made a rule of another: This lately happened in the Exchequer, where it was agreed that the submission should be made a rule of the Court of King's Bench: and the Court of Exchequer, on an application made to them for relief by one of the parties, refused to interpose on the ground that they had no jurisdiction, and said the application must be to the Court of King's Bench, of which the submission had been made a rule.[1]

When the submission is according to the provisions of this statute, the court will compel a witness to it,

[9] Ansell v. Evans, 7 Term Rep. 1.

[1] Chapman v. Lansdown, 1 Anstruth. Rep. Exch. 273.

to make an affidavit of it, in order to enforce the award: for though the words of the statute be not compulsory, the very nature of the thing gives the court a jurisdiction over the witness. The act of parliament has appointed only this way by affidavit, and a witness must not be permitted to evade it by his refusal: a witness to a bond is compelled, by a *subpœna*, to give evidence of the execution; and every man who subscribes his name as a witness to an instrument, undertakes, by implication, to give evidence at a proper time, and in a proper manner: no objection to this arises from the suggestion that the award was unfairly made, and that the party has no other means of preventing the submission from being made a rule of court: the hardship of a particular case must not be permitted to vary a rule founded on general principles of utility.[2]

But in order to found the application for a rule against the witness to make the affidavit, it seems to be necessary to lay before the court some circumstance to satisfy them of the probability of his being a witness; as an affidavit of his having acknowledged that he was; or an affidavit of the party applying, that he really is so.

Such an application is not frequently necessary, and therefore it does not appear whether the rule granted in consequence of it may be absolute in the first instance, or must be only a rule to shew cause. The few cases that are reported have been of rules of the latter kind.[3]

[2] Clark v. Elwick, 1 Str. 1, 2. [3] Vid. Barnes, 58. 10 Mod. 332, 333.

It is not necessary that the agreement to make the submission a rule of court should be part of the condition, or that it should be actually signed: if it be written under the condition, and the subscription, by affidavit, appear to have been made before the execution of the bond, the court will take it to be part of the submission, as an indorsement by way of defeasance is part of a deed.[4]

If the application be on behalf of one of the parties, and it appear by the bond of the other, produced in court, that it was executed by him, the motion will be granted of course; the consent of the latter appears by the execution of the bond.[5]

A submission was by bond, and in the end of the condition was this clause: "And if the obligor shall consent that this submission be made a rule of court, then, &c." A motion to make this submission a rule of court was opposed, on the ground that these words do not imply his consent; but that if he chose to forfeit his bond, he might prevent its being made a rule of court: the words, however, were considered by the court as a sufficient indication of consent, because they could have been inserted for no other purpose, and the motion was accordingly granted.[6]

But if the agreement be only that the "award" shall be made a rule of court, that is not sufficient, it is said, to ground an application to have the "submission" made a rule of court.[7]

[4] Carter v. Mansbridge, Barnes, 55.

[5] Rudd v. Coe, Barnes, 55.

[6] Baily v. Cheesely, 13 W. III. 1 Salk. 72. Comyns, 114. 1 Lord Raym. 674.

[7] 2 Barnardiston, K. B. 163. Str. 1178. [3 East, 603. Pedley v. Westmacot, contra.]

If a cause be referred by consent at *nisi prius*, in London or Middlesex, application must be made for the order of *nisi prius*, to the clerk of *nisi prius;* if on the circuit, to the judge's associate, whose business it is to draw it up: and the attorneys ought to set down the names of the witnesses proposed to be examined on the reference, on a piece of paper, and deliver it to the crier, who will swear them at the bar of the court, otherwise they must attend a judge to be sworn.[8]

It was formerly held, that the staying of a cause was necessarily implied in a reference; and even that if one of the parties to a suit said he would refer the matter to such a one, the cause must stay of course; because, says Twisden, that man is made judge. But it was afterwards declared by Lord Chief Justice Holt, that all the judges of the King's Bench had made a rule, that no reference whatever of any cause depending in that court should stay the proceedings, unless it was expressed in the rule of reference to have been so agreed.[9]

*Extent of the Submission.*

The extent of the submission may be various according to the pleasure of the parties; it may be of one particular matter only, or of many, or of every subject of litigation between them; but what extent shall be given to the particular words of it will be more properly discussed in another place.

It is usual, and even necessary, to fix a time within which the arbitrators shall pronounce their award; for on the one hand, a delay is necessary for instructing the

[8] 1 Compton, 263. Impey, 571.

[9] 1 Mod. 24.

[1] 2 Lord Raym. 789.

arbitrators, and putting the question in a condition of being determined; and on the other the time ought to be limited, because it would not be just, that it should be in the power, either of arbitrators or of the parties, to put off the final decision for ever.[2]

*Submission, how construed.*

The submission, being the voluntary agreement of the parties, the words of it must be so understood as to give a reasonable construction to their meaning, and to make their intention prevail: therefore, where the submission was by deed, rehearsing that *each* of the parties was bound to the other in a sum of 100*l.* and they, by the same deed, granted, that "if *each* of them should stand to the award of A. B. then the obligation of him who performed the award should be void, and that of him who did not should be in full force:" and it was objected, that this submission was void, because it imported that *each* of them was bound for the performance of the award by the other. This construction was rejected as absurd and nonsensical, and contrary to the plain meaning of the parties: and it was held, that the words, "if each of them shall stand," &c. should be taken in the same sense as if the submission had been expressed thus, "that the one was bound to the other, and the other to him, each that himself should stand to the award, if not, his obligation to be in full force."[3]

So, where the condition of a bond was to stand to the award of two arbitrators, with a proviso that it should be made on or before the 23d of January; but if the arbitrators should not agree on the award, that

[2] Domat. 1 vol. 224.

[3] 39 H. 6. 9. b. 11. a.

then they should choose an indifferent man, and "they" should stand to the final end, determination and judgment, which he should give on or before the 28th of January, under his hand and seal: it was seriously argued, that the last pronoun, "they," not having immediately before it any antecedent, to which, in the grammatical order of the sentence, it could be referred, applied to the arbitrators, who were to perform the award of the umpire; but good sense prevailed over this objection, and the court held that it should be referred to the parties themselves.[4]

Where the submission was to the award of four men by name, "so as the *same* award be made, and delivered up in writing by them, or any three of them:" it was not till after several solemn arguments, that the court were prevailed on unanimously to hold, that these words gave an authority to any three of the arbitrators named to make the award, the latter words being explanatory of the meaning of the parties in the former: that though in technical exactness the "same" award referred to the former part of the sentence, and might be taken to mean the award made by four, yet as this construction would render the latter words perfectly useless, it must be rejected, and the obvious meaning of the parties, on the whole, adopted: that the "same" award should be referred to the thing, and not to the person; so that it should be interpreted "the same" award of the same things, to be made by the said arbitrators, or any three of them.[5]

[4] Butler v. Wigge, 2 Keb. 204. 1 Saund. 65.

[5] Vid. 1 Rol. Rep. 375. Cro. Jac. 400. Bridgeman, 91. Mo. 849. 3 Bulstr. 62. 1 Bulstr. 122, 123. Brownlow, 112. Yelv. 203. Cro. Jac. 277. The cases of Sallows v. Girling, and Berrie v. Perrie.

The reader, perhaps, anticipates the observation, that a mind unacquainted with the history of legal chicane, will hardly be able to conceive that a doubt could be raised on the subject.

Where there is a repugnancy in the words of any part of the submission, the latter shall be rejected, and the former stand: as if the condition of a bond, dated the 16th of March, be to stand to an award, with a proviso that it be made on or before the last day of "this instant" month of "April;" here, as no month can answer to the description of this "instant month," but that in which the words are used, namely March, the words of "April" shall be rejected; for there is nothing to determine them to the next April, any more than to the April of any other year: therefore, if the award be not made till the last day of April, or indeed at any time after the last of March, it will be made at a time out of the submission, and therefore of no effect; but had it been "on or before the last day of April," without the words, "of this instant month," in order to avoid the uncertainty, it should have been taken to mean, the April of the same year.[6]

*Submission may be revoked.*

All kind of authority is in its nature revocable, though made irrevocable by express words; therefore, if one of the parties, before the making of the award, or before the expiration of the time for making it, revoke the authority of the arbitrators, the latter cannot proceed; or if they do, the party revoking is not bound to perform their award, but may plead the revocation in bar

[6] Sherry v. Richardson, Popham, 15, 16.

of an action on the award itself; or he may himself recover against the other, in an action for the original cause of dispute:—and, in this respect, our law corresponds with the civil law.[7] But if one on one side, and two on the other, submit, one of the two cannot revoke the authority of the arbitrator without the other; for being jointly given, it must be jointly taken away.[8]

If the submission be merely verbal, the revocation may be so too; "I discharge you from proceeding any further," said to the arbitrators, will be sufficient. But if the submission was by deed, so also must the revocation be,[1] according to that general principle of law, that every power, authority, or obligation, must be discharged with the same solemnities with which it was constituted.[2]

This principle, however, applies only to the case of an express revocation; it does not extend to that which must necessarily be implied by construction of law, from another act of the party; for a collateral act may sometimes amount to a revocation of the authority of the arbitrators. Thus, if a woman, while sole, submit to arbitration, and marry before the making of the award, or before the expiration of the time for making it, the marriage is a revocation; because, by that, all the personal property of the wife, and a per-

[7] Ff. l. 4. t. 8. s. 27. v. fin.

[8] 5 Ed. 4. 3. b. 8 Co. 82. a. Br. Arb. 35. 21 H. 6. 30. a. 28 H. 6. 6. b. 6 H. 7. 10. 28 H. 6. 6. Fitzh. 51. a. Br. 44. b.

[9] Barker v. Lees, 2 Keb. 64, 79.

[1] 43 E. 3. 9. Fitzh. 52. b. vid. 8 Co. 80. b.

[2] Unumquodque dissolvitur eo ligamine quo ligatur.

manent interest in her real property, which would be bound by the award, vests in the husband.[3]

So, where a man brought an ejectment against another, to recover a mill of which the latter was in possession, the defendant suffered judgment to be entered by "nil dicit;" but afterwards they agreed to refer the question, "Who should have it," and other matters which were in difference between them, to arbitration by bond. The plaintiff, in the ejectment, before the expiration of the time limited for making the award, sued out an "habere facias possessionem" on the judgment, and had the mill delivered to him; and on an action of debt being brought on the submission bond, it was held, that by taking away the subject of the arbitration, he had taken away the possibility of making the award.[4]

In the year books, a distinction is taken between a submission by obligation, and a submission *without* obligation. In the first case it is said, that the obligor *cannot* discharge the arbitrator, because he is bound to stand to his award; but that in the latter it is otherwise. Lord C. J. Coke explains this distinction in this way; that in both cases the authority of the arbitrator may indeed be revoked; but that where the submission is without obligation, the party revoking loses nothing; whereas, in the other case, he forfeits the penalty of his bond: for by countermanding the authority of the arbitrators, he has not fulfilled the condition, by standing to, and abiding by their award; and because, when a man, by his own act, renders the condition of the

[3] Wm. Jones, 388. 3 Keb. 9. Jones, 134.
[4] Green v. Taylor, Sir T. [5] 5 Ed. 4. 3. b.

bond impossible, the bond becomes single, as if no condition had been annexed.[6]

This difference in the effect of a revocation in the two cases, was certainly good law at the time, when it was held, that no action could be maintained on an award of a collateral thing made in consequence of a parol submission; but now that it is held, that an action may be maintained on such an award, it may reasonably be supposed the courts would also sustain an action on the case for countermanding the authority of the arbitrator. A case is reported in two books, in one of which a doubt is expressed, whether all being by parol, the plaintiff could maintain that action, or have any other remedy; but that is evidently nothing more than a loose note of the reporter, and the pleadings are there very inaccurately stated. In the other book, the case is reported at length, and the manner of the pleadings distinctly given; the breach being assigned in a discharge by the defendant of the arbitrators from making any award; and the judgment of the court, without much hesitation, in favour of the plaintiff.

The rule of the civil law is, that when the arbitrator is discharged by one of the parties, or prevented by his act from making his award, then, if a penalty was not added to the submission, the opposite party should have a remedy similar to our action on the case.[9]

[6] Vynior's case, 8 Co. 82. a. Brownlow 62. 2d part 290.

[7] Newgate v. Degelder, 18 Car 12. 1 Sid. 281.

[8] 2 Keb. 16, 20, 24.

[9] Si quis litigatorum defuerit: quia per eum factum est, quo minus arbitretur, pœna committetur. Et si quis presens arbitrum sententiam dicere prohibuit, pœna committetur. Sed si pœna non fuisset adjecta compromisso, sed simpliciter *sententiæ stari* quis promiserit: incerti adversus eum foret actio.—Ff. l. 4, t. 8. s. 27.

If one of the parties first revoke the authority of the arbitrators, and afterwards request them to make an award, that will not save the forfeiture. But where the submission limits no time for the making of the award, that shall be understood to be within convenient time; and if in such a case the party request them, and they do not, a revocation afterwards will be no breach of the submission.[1]

One party may also revoke with consent of the other; but consent after the revocation will not save the penalty of the bond.[2]

In the case too of a revocation, by the marriage of a feme sole, if the husband and wife submit again, the courts will not encourage the opposite party in suing for the forfeiture.[3]

There may be several acts done by either of the parties before the award made, which, though they cannot properly be called a revocation, yet amount to a breach of the submission. Thus, where a man submitted to pay such costs as should be stated by arbitrators chosen indifferently by the parties, it was held to be a breach in him not to have carried in his bill to the arbitrators, because he was the cause that no award was made.[4]

Whether the parties may revoke, when the submission is by rule of court, by consent at *nisi prius*, or in pursuance of the statute of William, it is immaterial formally to lay down. It has been seen, that, in the latter case, the courts have made the submission a rule

[1] 2 Keb. 10, 20.
[2] Noble v. Harris, 3 Keb. 745.
[3] 3 Keb. 9.
[4] Baldway v. Ouston, 1 Vent. 71.

of court, notwithstanding the opposition of the parties; and, in both cases, they will punish as a contempt any act by which the arbitrators are disturbed or hindered from making their award.[5] Thus where a matter was referred by consent at *nisi prius* to the three foremen of the jury; and before the award was made, one of the parties served the arbitrators with a subpœna out of Chancery, which hindered them proceeding to make an award; the court held this to be a breach of the rule, and granted a rule to shew cause why an attachment should not go against him.[6]

In the civil law the better opinion seems to have been, that if the party to a submission, while the matter was before the arbitrator, appealed to the ordinary courts he forfeited the penalty.[7] (*a*)

[5] Vid. 1 Cromp. Pract. 262. [Vid. Milne and others, Assignees, &c. v. Gratrix, 7 East, 608.]

[6] Davila v. Almanza, 1 Salk. 73.

[7] Si quis rem, de qua compromissum sit, in judicium deducat; quidam dicunt, prætorem non intervenire ad cogendum arbitrum sententiam dicere: quia jam pœna non potest esse, atque si solutum est compromissum. Sed si hoc obtinuerit; futurum est, ut in potestate ejus quem pœnitet compromisisse, sit compromissum eludere. Ergo adversus eum pœna committenda est, lite apud judicem suo ordine peragendâ. Ef. l. 4, t. 8, s. 30.

*Of submission by rule of Court in Pennsylvania.*

(*a*) In the state of Pennsylvania a mode of reference unknown to the law of England, and attended by certain peculiar effects was introduced by an act of assembly in the year 1705. The third section of this act provides "That in all cases where the plaintiff and defendant having *mutual accounts to produce one against another*, [1] shall by themselves or attorneys or agents consent to a rule of court

" court for referring the adjustment thereof to certain persons " *mutually chosen by them in open court*, [2] the award or report of " such referees being made according to the submission of the " parties *and approved of by the court*, [3] and entered upon the " record or roll, *shall have the same effect*, and shall be deemed and " taken to be as available in law *as a verdict* given by twelve men, " [4] and the party to whom any *sum or sums of money are* thereby " *awarded to be paid*, shall have judgment *or a Scire Facias* for the " recovery thereof [5] as the case may require, and as is herein " before directed concerning sums found and settled by a jury, any " law or usage to the contrary of this act in any wise notwithstand- " ing."

[1] *In what cases the rule is granted.* The language of this clause evidently confines the particular remedy to cases in which the parties have *accounts* against *each other;* and the usual intricacy of such accounts, which a jury for the most part is incompetent to disentangle, furnishes a satisfactory reason for referring them to the patient and informal examination of arbitrators. But the law has been extended by construction not only to every other cause of action, but to cases in which there is no mutuality of demand; so that at this day there is no species of civil controversy known to the law of Pennsylvania for the adjustment of which the parties may not call in aid this act of assembly. In *Primer* v. *Kuhn*, 1 Dall. 456. a case which turned upon a different section of this law, the court say, " There is another clause in the defalcation act which provides " that where a plaintiff and defendant have *accounts* to produce one " against another they may refer them and the report of the re- " ferees shall have the effect of a verdict; now although the " words are confined to the case of *accounts*, yet the construction " of the act has liberally extended the right and benefit of such a " reference *to every other cause of action.*"

So in *Austin* v. *Snow's lessee*, in error, 2 Dall. 157. where the objection to the judgment below was that the referees had found for the plaintiff in ejectment with costs but without damages, the court say that " the usage of *referring ejectments* as well as accounts " is very ancient, and it has been the constant usage to confirm " awards although no damages or costs are found."

So

So in *Buckley* v. *Durant*, 1 Dall. 129. which was an action of *trover*, the cause was in like manner referred, and the report being excepted to, it was by agreement referred de novo.

So in *Dunning* v. *Caruthers* (cited in *Calhoun's lessee* v. *Dunning*, 4 Dall. 121.) an action of *trespass quare clausum fregit*, and the plea *liberum tenementum*, there was a reference and an award for the plaintiff confirmed by the court.

Indeed so partial have the courts been to the influence which it will be seen is given them by a subsequent clause of this section, over awards made under its authority, or so well satisfied have been the parties to diminish the power of the private tribunal by subjecting it to a very extensive controul by the court, that this species of award has entirely silenced one of its competitors at common law; and among all the printed reports in Pennsylvania, there is not to be found a single reference by rule of court, to which the principles which govern awards made under a rule of Nisi Prius in England, have been applied. At the same time there is nothing in the rule itself which distinguishes it from a rule at common law. It may be from the face of it either the one or the other. Were it not for the extension of the act, it would be presumeable that in all cases it was a rule at common law where the action did not introduce *mutual accounts*; but the presumption is certainly at this time the other way. What would be the effect of inserting in the rule of court, that it was at common law, has not been decided, as it never occurs in practice; perhaps the court would consider it as a bar to those particular objections which are available against the statute award. For although the rule at common law has fallen into disuse, yet it is observable from the following quotation, that it has judicially been deemed to be in full force at the present day.

In the case of *Dixon's lessee* v. *Morehead* in the Common Pleas of Westmoreland, 1794, Addison's Reports 216. the president enumerates the various awards known to the law of England, together with the statute award of this state.

"1. At common law, the parties differing may agree either by "word or by writing sealed or unsealed to submit their dispute to "arbitrators without instituting any suit, and the award of the arbi- "trators binds the parties. If it be not obeyed by either party, the "other has his remedy by an action at law either on the submis- "sion or on the award."

"2. Where

" 2. Where the parties have instituted a suit either at law or in " equity, they may agree to withdraw the examination of it from " the jury or the court, and submit it to arbitrators, making this " submission a rule of the court where the cause is depending. " The award when made is brought into court, and upon the com- " plaint of either party, if it has been improperly made, the court " set it aside, or if no impropriety appear, compel obedience to it by " process of attachment, disobedience being a contempt of the rule " made by the court."

" 3. From the experience of the use of these peaceable and do- " mestic tribunals, a statute enacted that parties in any case where " the remedy is by personal action or suit in equity, may without " any such action or suit submit their difference to arbitration, and " agree that such submission be made a rule of any court of record; " and this submission having been made a rule of one of the courts, " and the arbitrators having made their award it is returned into " the court of which the submission was made a rule, and by that " court on the complaint of either party, within a limited time, " annulled; or it is enforced in the same manner as an award in a " case where a cause was depending at the time of the submission. " For this statute is only declaratory of what the common law was " before in cases where there was a cause depending, and was made " to put submissions where there was no cause depending on the " same foot as those where there was a cause depending."

" 4. Our act of assembly in cases of mutual accounts did not " copy this English statute, but introduced into Pennsylvania a " fourth species of awards, which differs from the second species " before mentioned in this, that the report when approved by the " court is to be proceeded on as a verdict by judgment, and then " by execution, or scire facias as the case may be, not by attach- " ment; and according to the decision of the Supreme Court in " this also that it is open to the exceptions which may be made to " a verdict.

" Together with this, the first and *second* kind of awards must " be considered *as existing here in full force;* for the third species " has never been introduced here."

There is a similar enumeration of awards in *Williams* v. *Craig*, 1 Dall. 313. but there is nothing in the case or in the judgment of the court, which appropriates to Pennsylvania the rule of reference at common law.

It

[2] *In what manner the referees are chosen.*

It is a very natural supposition that if in a course of years a statute could be so completely twisted as this has been from its spirit as well as its letter with a view to extend its benefits to every case, it could not be very difficult in the same period to surmount the ceremony of an election of referees in open court; and accordingly where an agreement is made in vacation to refer a cause to certain persons, and the agreement is filed with the prothonotary, the authority of the arbitrators is complete, and their award is recognized by the court in the same manner as if the choice had conformed with the letter of the act. But where the court nominates the referees subject to a power of rejection in the parties, which is the most usual way, the presence either of the parties or their attorneys is required, unless it be waived by an agreement in writing.

Thus in *Shippen's Lessee* v. *Bush*, 1 Dall. 251. a motion was made for the appointment of referees in the absence of the opposite *counsel*, though as was said by agreement. But the court reply, "That it is an invariable rule not to appoint referees but in the presence of both *parties*. So many disputes have arisen about what was the meaning of attorneys, that we have determined not to pay any regard to agreements which are not reduced to writing."

This is but a short note; and there is evidently something inconsistent in the statement that the presence of the parties is *invariably* necessary, while an implication immediately follows that an agreement in writing will supersede this necessity. The term *parties* is also of doubtful propriety, for it was the absence of *counsel* which gave rise to the question, and by a necessary relation of words in the act, the choice may be made by the plaintiff and defendant, *their agents or attorneys*. There is therefore probably some mistake of the language of the court; and the meaning is that the plaintiff and the defendant must either be present or represented in court at the appointment of referees, or this must be waived by an agreement in writing.

An attorney's agreement to refer, binds his client. *Somers* v. *Balabrega*, 1 Dall. 164.

[3] *Of the means of procuring relief when the award is improperly made.*

For this head, which contains what is the most peculiar in the law of awards under rule of court in Pennsylvania, the reader is referred to the end of Mr. Kyd's chapter vii. upon the same subject.

The

[4] [5] *Of the remedy to compel performance.* The discussion of this head is to be met with at the end of Mr. Kyd's chapter vi. upon the same subject.

*Of rescinding the rule of reference.* It is generally allowed to either party upon motion to strike off the rule of reference under the act of assembly, that is, to revoke the authority of the arbitrators, at any time before they have entered upon the investigation of the dispute; and this without presenting a very strong case to the court. But it rests entirely with the court where the parties disagree; and the motion is uniformly refused if the arbitrators have not been guilty of misconduct, and have proceeded to any extent in the matter submitted to them.

The referees having examined the evidence in the presence of both parties agreed upon their report; but about an hour before it was delivered into court, though it was signed the preceding day, the defendant obtained a rule to shew cause why the rule of reference should not be struck off. The rule was discharged after argument; the court saying, that the motion was *much* too late to annul the reference when the referees had investigated the whole transaction, had agreed upon their report, and were clear from any imputation of misconduct, or any precipitancy in refusing to hear the testimony offered by either party. *Oxley & al.* v. *Olden*, 1 Dall. 430.

So in *Ruston* v. *Administrators of Dunwoody*, determined in the Supreme Court, March Term 1803, a motion was made on behalf of the plaintiff to strike off the rule of reference, upon the ground that the original defendant was dead, and that the rule had been assented to by the plaintiff with the expectation that from a personal understanding with the defendant he would derive certain accommodations, which his administrators who were now parties to the action could not give. It was answered that there had been several meetings during the life of Dunwoody, that therefore the plaintiff had derived the accommodations he contemplated, and that it was a general practice of the court to refuse to rescind a rule of reference *after there had been a meeting* of the referees. There was also a particular argument founded upon the act of assembly under which the administrators became parties to the suit upon Dunwoody's death; but it does not bear upon this point. Per CURIAM—Rules of reference should not lightly be struck off, after a party has felt the pulse of the referees at a meeting, and concessions have been made which cannot be afterwards used. Upon the circumstances of this case we must refuse the motion.

Nor

Nor can a party defeat the rule of reference by removing his cause to a superior court after the arbitrators have entered on the business.

Thus in *Grubb's Executors* v. *Grubb's Executors*, 2 Dall. 191. the cause being referred in the common pleas the referees made report into office; and afterwards the plaintiff removed the cause by certiorari into the Supreme Court. A motion for a *procedendo* was made on behalf of the defendant, on the authority of a certain case of *Pigot* v. *Young*, in which it had been decided that a cause could not be removed after the arbitrators had entered on the business submitted to them; and the court accordingly awarded a procedendo.

Nor can the plaintiff avoid an application to the court, and defeat the rule by *discontinuing* his cause.

In *Pollock* v. *Hall*, 4 Dall. 222. after several meetings by the referees, and an exhibition of the respective proofs of the parties, the plaintiff conceiving that he had more evidence which might be produced at a future period, or conjecturing that the referees were unfavourable to his claim, discontinued his action and gave notice to the defendant. But the referees proceeded to decide upon the matters referred, and filed a report finding for the defendant the sum of dollars 2300. To this report an exception was taken among others that the action was discontinued; and in support of the objection it was argued that the act of assembly having placed a report of referees upon the same footing with a verdict, the plaintiff might as well defeat the one by a discontinuance as the other by a nonsuit; and several cases were cited from the records of the court, in which a discontinuance by the mere act of the plaintiff had taken place after reference, and one, the case of *Sterrett* v. *Chambers & al.* after report filed. It was answered, that generally there could be no discontinuance without leave of the court; and that the statute reference was of a peculiar character, which implied the agreement of the parties to receive the report of the referees, and which by the operation of a set-off frequently converted the defendant into the real plaintiff with the remedy of a scire facias. By the COURT. "The case of *Sterrett* v. *Chambers & al.* induced us to pause, before we decided the point now submitted to our consideration. It does not appear however that the right to discontinue was at all contested in that case; and the other cases cited from

our

our records, do not import any judicial decision that would be binding upon us as authority on the present occasion. In this situation we think we are at liberty to deny the right for which the plaintiff contends; and that the policy of the legislature as well as the principles of justice will sanction the denial. The act of assembly sought to compose strifes, to shorten litigation, by assigning an amicable tribunal to which the parties might voluntarily resort; and when both have agreed to resort to that tribunal, it would be inconsistent with the general nature of an agreement, to permit one of them alone to withdraw from its jurisdiction. Feuds would be inflamed instead of being allayed; and suits multiplied instead of being diminished, by such a construction of the law. There may be cases however in which a plaintiff alleging surprize or mistake would be allowed to discontinue his suit; but after an agreement to refer, *a disclosure and hearing before the referees*, and an *opinion expressed or intimated* by them upon the merits, a discontinuance cannot be regarded as a matter of right, and would only be permitted upon very cogent reasons, *such perhaps as would invalidate the report itself.* In the present case we are of opinion that the plaintiff had not a right to discontinue the suit, and that no sufficient reason appears for allowing a discontinuance upon the authority of the court."

*Of submission agreeably to the Act of 21st March* 1806.

In the year 1806, the legislature of Pennsylvania, principally with a view to facilitate arbitration without the intervention of an attorney, and in cases not depending in court, passed a law entitled, "An act to regulate arbitrations and proceedings in courts of justice;" the first four sections of which contain all the provisions material to this head.

Sect. 1. "That it shall be lawful for any person or persons, desirous of settling any dispute or controversy by themselves, their agents or attorneys, to enter into an agreement in writing, to refer such dispute or controversy to certain persons to be by them mutually chosen; and it shall be the duty of the referees, to make out an award and deliver it to the party in whose favour it shall be made agreeably to the directions of this act, together with the written agreement entered into by the parties, and it shall be the duty of the prothonotary on the affidavit of a subscribing witness to the agreement, that it was duly executed by the parties to file the same

in his office, and on the agreement being filed as aforesaid, he shall enter the award on record, which shall be as available in law as an award, made under a rule of reference, issued by the court or entered on the docket by the parties, and the same proceedings shall be had thereon, as are prescribed in the third section of this act.

Sect. 2. "That in all cases where an action has been or hereafter may be depending in court, or an amicable suit is or may be entered in the prothonotary's office, the plaintiff and defendant may either in vacation or term time, by themselves, their agents or attorneys, consent to a rule of court, for referring their cause to certain persons to be by them mutually chosen.

Sect. 3. "That the referees chosen in pursuance of the directions of this act, shall be sworn or affirmed, (unless the same shall be dispensed with by the consent of the parties), to try and determine the cause referred to them, and a just award make out under the hands and seals of a majority of them, agreeably to the terms of the submission; which award shall be sealed up by the referees and delivered to the person in whose favour it shall be made, who shall deliver the same without breaking the seal, to the prothonotary of the proper county, who shall enter the same of record in his office; and if the said award be entered by the prothonotary in vacation, it shall be the duty of the party in favour of whom it is made, to serve a copy thereof on the adverse party, his agent or attorney, at least ten days preceding the first day of the next term, and if no exceptions be filed against the same, during the said term, it shall have the same effect and be recovered in the same manner as a judgment entered by the court, on the verdict of a jury, and if the award be entered by the prothonotary in term time, it shall in such case, be the duty of the party in favour of whom it is made, to serve a copy thereof on the adverse party within ten days after the expiration of such term; and if no exceptions be filed with the prothonotary, within twenty days after receiving such notice, it shall become a judgment and be recovered as aforesaid; but in case either party file exceptions to the award entered as aforesaid, and the same being finally set aside by the court, if it be the plaintiff filing such exceptions, and he shall again prosecute his action either in a court of justice or before other referees, and shall not recover a sum equal o greater than was fir awarded, he shall not have judgment for costs, and shall pay the defendant seventy-

five

five cents per day, while attending on the same, and if the defendant file such exceptions, and the award be set aside by the court, and the plaintiff by a new action, shall recover a sum equal or greater than the original award, then, and in that case, the plaintiff shall have judgment for all the costs accrued on such suit, together with seventy-five cents per day, whilst attending the same.

Sect. 4. "That the referees chosen under the direction of this act, shall each be allowed one dollar per day for his services, which shall be taxed with other costs of suit, but if either of the parties do not appear on the day appointed for the referees to meet, the party neglecting to appear, either by himself, his agent or attorney, shall be liable for all costs which may have accrued on that day in said action, unless it be made appear to the satisfaction of the referees that the absent party could not attend, in which case, or for any other sufficient reason, the referees may postpone the trial to some other day certain, and if any referee so chosen and notified, shall neglect or refuse to attend at the time and place appointed to hear the parties, he shall for every such neglect or refusal, (unless prevented by sickness or other unavoidable accident), forfeit and pay the sum of two dollars, for the use of the poor, and where there are no poor, to be paid to the supervisors of the highways of the city, town, district or township, in which such persons neglecting or refusing shall reside, which fine shall be recoverable before any justice of the peace in the proper county, as other fines are by law recoverable: *Provided*, An action be brought therefor within thirty days after such neglect or refusal."

This law is of such recent origin that it has not often been in this particular the subject of judicial decision. But thus much is indeed apparent in the law, that the rule of reference heretofore used, is in no manner affected by it, either in its extent or in its consequences. The established rule of reference is in fact made the standard of the effect to be given to awards introduced by this law; and where practical directions are given upon the subject of *notice*, *costs*, or *compensation to the arbitrators*, they are understood to operate only upon those particular cases of awards.

It is probable therefore that the same objections which defeat awards under the act of 1705, whether they relate to the mistakes or to the faults of the arbitrators, will apply to awards under the act of

of 1806; and that they must be enforced in the same way, except in the single instance of an award of money to the *defendant* under a rule assented to by the parties in vacation, either in a cause before depending or then instituted for the purpose; in which case the third section by declaring that the award, in whose favour soever it is, shall become a *judgment*, seems to exempt the defendant from the necessity of using a *scire facias*.

The principal alterations of existing law produced by this act appear to be the following:

1. An award in *writing* made under a *written* agreement of reference, and filed in the office of a prothonotary after proof of the agreement by a *subscribing witness*, is as available as an award made under a rule of court (sec. 1). This provision extends further even than the statute of William.

2. The parties themselves may enter an amicable action in vacation (sec. 8.) and may then agree to the usual rule of reference (sec.

3. The award must be under the hands and *seals* of the arbitrators or a majority of them, or it is no award under this law (sec. 3).

4. The arbitrators have a fixed daily pay taxable as costs; and are bound to serve under the penalty of two dollars for every neglect or refusal to attend at the time and place appointed for the meeting. They are therefore in these awards placed upon much the same footing with jurors; and if the law be construed strictly, it does not appear how any one who is chosen, can without incurring the penalty, avoid serving as an arbitrator in *any* extrajudicial reference agreed to by *writing*, unless he can offer the excuses recognized by the law; for although the penalty operates only upon the arbitrators chosen *according to the directions of this act*, yet it cannot be known until the arbitrators have made their award, whether the party in whose favour it is given, will choose to file it in court agreeably to the first section (sec. 4).

5. The party who does not attend the arbitrators upon the day appointed *must* pay the cost incurred that day, unless his excuse will justify a postponement: and this although the arbitrators can by certain implication proceed without him, or the party may *choose* to *waive his presence* altogether (sec. 5).

## CHAPTER II.

### THE PARTIES.

*Who may submit.*

IT is a general rule, that every one who is capable of making a disposition of his property, or a release of his right, may make a submission to an award: but no one can, who is either under a natural or civil incapacity of contracting.[1] Therefore a married woman cannot be party to a submission, whatever may be the subject of dispute, whether arising before or after her marriage: but the husband may submit for himself and his wife.[2]

On the principle that an infant cannot bind himself for any thing but necessaries, it is clear he cannot be party to a submission, whether the matter in dispute be an injury done to him, as for a battery committed on him, or for a trespass on his land;[3] or an injury done by him to another. The last case, however, was not always considered as clear law; and it has been insisted that he might submit a trespass committed by himself, because that might be for his benefit; and if he could

[1] Com. Dig. Arbitrament. D. 2. H. 4. 12. Dub. Rol. Arb. 2 A. 1.
[2] Sti. 351. Rol. Arb. 2 A. 2, says cont. 10 H. 6. 14.
[3] 10 H. 6. 14. Fhbt. 51. a. 13 H. 6. 14.

not, instead of being favoured by the law, he would be in a worse condition than other men: but that reason fails; for though it *may* be for his benefit, it may as probably be otherwise; for the arbitrator may award a greater satisfaction than might be given in the due course of law, or the damages awarded may be increased on account of things, for which, by the law, the infant cannot be charged; and the rule with respect to an infant is, that he cannot bind himself to any thing which, by possibility, may be to his disadvantage. It has also been said, that the infant ought to have an election, whether he will perform the award or not, and that therefore an award made, in consequence of a submission by him, is not absolutely void, but voidable only:[4] but this is contrary to the very intention of a reference to arbitrators, which is to put a final period to disputes.

And as the infant himself cannot be bound by a submission to arbitration, so it has also been decided, that if another enter into a bond, conditioned, that an infant shall perform an award, this is also void, and the obligor could not be sued upon it. But this, it is to be observed, was without any argument applicable to this particular case, but only taken as an immediate conclusion, from the principle that the infant himself could not be bound.[5]

Lord Chancellor Nottingham, however, appears to have acted on this principle in the following case. A cause depending in Chancery, where an infant by his guardian seems to have been a party, the matters in

[4] Rudston v. Yates, March 111, 141. [5] Id. ibid.

difference were, by consent and order of court, submitted to arbitration; and the arbitrators, among other things, awarded that a bond should be given by the guardian that the infant at his full age should convey the lands in question. On one side an application was made that the award should be set aside, and on the other that it should be enforced by the decree of the court. The Lord Chancellor, premising as a general principle, that the court would not decree the execution of an award made in consequence of a reference by order of the court, where the award appeared inequitable, applied this principle to the present case, and said it was unreasonable that the guardian should give such a bond, as the infant might die before age, or if he lived to attain his age might refuse to convey, and therefore he would not decree performance: he said further, that he would never decree an award to bind an infant.[a] Yet it seems to be carrying the indulgence to an infant by much too far, and to be contrary to the analogy of law in other cases, that a bond given by a person of full age, for the performance of an award by an infant, should not be enforced. It is in fact saying, that in all cases, where an infant cannot bind himself, no one else can be bound for him; which cannot be pretended to be true. The infant himself indeed cannot be compelled to perform the award, neither is it in the power of his security to force him; but it is by no means a singular thing that a man shall forfeit his bond, though it be not in his own power to save the penalty, by performing the condition. There is, in-

[a] Cavendish v. ——, 2 Ch. Ca. 279. 1 Eq. Ca. Abr. 49.

deed, an implied exception in the case of submission to an award; that if the award itself be void, he shall not forfeit his bond by non-performance.[7] But this exception extends only to the case where the objection appears on the award itself; and, if this be good, there appears not the shadow of a reason why the security for the infant's performance should not forfeit his bond on the infant's default.

The same point was again agitated in another case; the same argument urged in avoidance of the award: "The submission on behalf of an infant is void, the award therefore is void, depending on a void submission, and a bond for performance of a void award is necessarily void; therefore the security cannot forfeit his bond." The same kind of answer was given as is suggested above; and though the opinions of the court are not stated in very decisive language, yet, on the whole, their inclination seemed to be, that the security forfeited his bond if the infant did not perform the award. In this case, indeed, the action was brought by the infant, and her security, for non-performance by the other party; but as the defendant's objections were founded on the supposition that the infant was not bound to perform her part, and that therefore there would be no reciprocity, the general principle is the same, whether the security for the infant be plaintiff or defendant.[8]

The same question was again agitated, but no decisive opinion given; because it appeared that the father had been bound for *himself* and his infant son; and it was

[7] Vid. Jenk. 116.

[8] Stone v. Knight, Latch 207.

held, that whatever might be the case with respect to the father's being bound for his *son*, yet his submission was good as to himself, and judgment was accordingly given for the plaintiff.[9]

But it was afterwards expressly decided, against the authority of the case[1] on which the doubt had at first been raised, that the guardian may submit for the infant, and bind himself that he shall perform the award. (*b*)

Thus we have at length adopted the good sense of the Roman law, by which it was held, that an infant himself could not be bound by his submission; but that if he submitted by a surety, the latter forfeited the penalty in default of the infant.[3]

An executor, or administrator, may submit a matter in dispute between another and himself, in right of his testator or intestate. Therefore, when the executor of a parson submitted to arbitration a dispute between the present incumbent and himself, as executor of the last, on account of some dilapidations of the parsonage, alleged to have been permitted by the default of the testator, and in his life, no objection was made to the want of power in the executor to submit:[4] but if the arbitrator do not give him the same measure of justice as he would be entitled to at law, the executor, or administrator, must account for the deficiency to those

[9] Bowyer v. Blorksidge, 33. Car. 2. 3 Lev. 17. Gill v. Russell, Hil. 1673. Freem. 62, 139.

[1] Rudston v. Yates, ante, p. 36.

[2] Roberts v. Newbold, 6 W. 3. Comb. 318.

[3] Si pupillus sine tutoris auctoritate compromiserit, non est arbiter cogendus pronunciare, quia, si contrà eum pronuncietur, pœnâ non tenetur; præterquam si fidejussorem dederit, a quo pœna peti possit. Ff. l. 4, t. 8, s. 35.

[4] Dyer, 216. b. 217. a.

(*b*) To the same effect is a decision of the Supreme Court of New York.

who are interested in the effects of the testator or intestate.[5] As, if an executor submit to arbitrament, and it be awarded, that for 70*l.* he release an obligation given to his testator in 100*l.* for performance of covenants which were broken by the obligor, the 100*l.* shall be assets, for the submission is his own act.[6]

If a man in the character of executor or administrator expressly bind himself, his heirs, executors, or administrators, to perform an award to be made on the subject of disputes between his testator or intestate and another, and the arbitrator award generally that as executor or administrator he shall pay a certain sum, he cannot to an action on the bond avail himself of a plea, "that he had fully administered, and that he had no assets of his testator or intestate at the time of the submission or since:" Such a plea is inapplicable to the case; for the party by such a submission, enters into a personal engagement to pay whatever the arbitrator shall direct, without regard to the question of assets. But the mere act of submission is not an *admission* of assets, and if the arbitrator simply declare a debt due from the testator or intestate, specifying the amount, the executor or administrator is not precluded from the plea of "fully administered:" And the plaintiffs, in an action of assumpsit against him in that character, cannot give evidence of a personal promise to pay whatever shall be found due; because, in the first place, the action seeks to recover the demand out

[5] Off. Exr. 229, cited Com. Dig. Administration (I. 1.)

[6] R. 3 Leon. 53.

[7] Barry v. Rush, 1 Term Rep. 691, et vid. 5 Term Rep. 8.

Debt on an arbitration bond entered into with plaintiff *as guardian* of E. W. submitting all things relating to a suit brought by plaintiff in the *same capacity*, against defendant for an assault and false imprisonment of the

of the testator's or intestate's effects, and if there be no assets, the personal promise by the representative is a *nudum pactum.*[8]

So, the assignees of a bankrupt may submit to arbitration, any disputes between their bankrupt and others, provided they pursue the directions of the statute, which enacts, "that the assignee, or assignees, of any bankrupt's estate and effects, with the consent of the major part in value of the bankrupt's creditors, who shall have duly proved their debts under the commission, and who shall be present at any meeting of the said creditors, pursuant to notice to be for that purpose given in the *London Gazette*, to submit any difference or dispute between such assignee or assignees; and any person or persons whatsoever, for or on account, or by reason or means of any matter, cause or thing whatsoever, relating to the bankrupt, his estate or effects, to the final end and determination of arbitrators to be chosen by the said assignee or assignees, and the major part in value of such creditors, and the party or parties with whom they shall have such difference, and to perform the award of such arbitrators—and the same shall be binding on all the creditors of the bankrupt."[9]

By virtue of the authority of this statute, the creditors present at a meeting cannot give a general power to the assignees to refer matters to arbitration according to their own discretion; there must be a particular

[8] Pearson et al. Assignees of Scott, v. Henry, Administrator of Henry, 5 Term Rep. 6.

[9] 5 G. 2. c. 30. s. 34.

the ward. Plea *no award.* Replication setting forth an award, "that defendant should pay to plaintiff, as guardian of E. W. £112, and each settle with his own witnesses." Demurrer shewing for cause, that the award was neither *mutual* nor *final*; as the payment was directed to be made to the plaintiff,

meeting, on notice for that particular purpose, in the London Gazette, to consider of each particular case.[1]

*Who shall be bound by an Award.*

It is a general rule, that those only who are parties to the submission shall be bound by the award.

Thus, if a man submit, for himself and partner, all matters in difference between the partnership and another, the partner submitting shall be bound to perform the award; but the other shall not, because he is a stranger to the submission.[2]

So, if the parson on the one hand, and some of the parishioners on the other, in behalf of themselves and the rest of the inhabitants of the parish, but without the authority of the rest, submit to arbitration by bond, the parishioners submitting shall alone be answerable for a breach of the award by any of the other parishioners.[3]

So, in general, a man is bound by an award to which he submits for another.[4]

But, if a man authorize another on his behalf, to refer a dispute between the principal and another, an award made in consequence of such a submission is binding on the principal alone; and it is no objection that the agent had no interest in the subject of the dispute.[5]

When there are several claimants on one side, and they all agree with the opposite party to submit the matter in dispute to arbitration, and some only of the

[1] Ex parte Whitchurch, 1 Atk. 91.

[2] Strangford v. Green, 2 Mod. 228.

[3] Mudy v. Osam, Litt. 30.

[4] Alsop v. Senior, 2 Keb. 707, 718.

[5] Dyer, 216. b. 217.

plaintiff, without any act to be done on his part, and the infant might at full age disavow all his guardian had done. But the court decided that it was

numerous party enter into a bond to perform the award, the award shall bind the rest. Thus, where A and B, two merchants, freighters of a ship, on one side, and C and D, part owners, and all the other part owners and mariners, on the other, submitted to the award of J. S. of all matters concerning a prize taken by way of reprisal: A and B entered into a bond, and C and D into another, to perform the award; and the arbitrator awarded, that the merchants should pay to C and D, for the use of themselves and the rest of the part owners and mariners, 1000*l.* This was held to be a good award; for if A and B did *not* pay the money, the part owners and mariners might have an action of debt against them on the award, because they were all parties to the submission, though only two were obligees in the bond: and if they paid the money to C and D, to the use of them and the rest of the part owners and mariners, though the proportion that each should have was not pointed out, yet, as they had jointly submitted, the award might be to pay them jointly; and although (the award, in fact, being to pay to C and D, for their own use, and that of others) it was on that account objected, that the residue of the part owners and mariners had no remedy to have their share but by action, yet, notwithstanding that, it was held they were bound by the award: and this case was assimilated to that of an award that one party should enter into a bond to pay a sum of money to the other at a future day, which was good, though it was only a thing in action; and the rest of the part owners might have their remedy, at least, in Chancery, against C and D, as trustees for them, if not at common law. And now that the liberality of the courts of common law

was *mutual*, because an award ordering payment of a sum of money, carries in itself a mutuality, as it must be held in satisfaction of the matter submitted,

has so greatly favoured the action for money had and received, there is no doubt, but that if a certain proportion of prize-money had been agreed on for each individual, before the adventure; or if their respective rights could be ascertained, each individual of the remaining number might maintain an action against C and D for so much money had and received to his use.[6]

Where there are two on one side, though they will not be bound the one for the other, yet if the award be general that they shall do one entire thing, not pointing out distinct parts to be done by each, both shall be bound to performance of the whole, and an action may be sustained against either for non-performance.

Thus, where there was a controversy concerning certain lands between A, B, and C; and A on the one part, and B and C on the other, submitted to the award of J. S. A becoming bound in an obligation to B and C in the sum of 1000*l.* to perform the award on his part; but B and C, unwilling to be bound the one for the other, entering into several bonds of 1000*l.* each to A, with several conditions: the arbitrator awarded, that A should release all his right in the land to B and C; and that, in consideration of this, B and C should pay 300*l.* to A. On an action of debt brought by A against B, on this bond, for non-performance of the award, and a breach assigned, that neither B nor C had paid the 300*l.* at the time limited by the award, it was held,

[6] Wood et al. v. Thomson et Clements, M. 24 Car. B. R. Rol. Arb. F. 11.

mitted, (Purdy v. Delavan, 1 N. Y. Term Reports, 304.) and *final*, because it was clear that a guardian might submit for his ward, and that the payment would operate as a discharge to the defendant from every demand by the infant for the matter submitted. *Weed* v. *Ellis*, 3 N. Y. Term Rep. 253.

that each was bound to the performance of the whole award; for they had jointly submitted, though by several obligations.[7]

But, in such a case, if the award had been several, certainly the one could not have been sued for non-performance on the part of the other.

If an attorney, without the express authority of his principal, enter into a bond to a third person, under a condition to be void on performance of the award by the principal, otherwise to be in full force, this shall bind the attorney, and not the principal.[8]

Yet, it is the common understanding, that the assent of the attorney in a cause, to a reference by a rule of *nisi prius*, will bind the client: and the reason of the difference seems to be this, that in the first case the general character of attorney does not imply a commission from the principal to do any thing so much out of the ordinary course of the business of a general attorney, as to refer a matter to arbitration; but the employment as attorney in a particular suit, implies the client's assent that he may do every thing which the court may approve in the progress of the cause.(c)

But it has been held in Chancery, that the assent of a solicitor to a reference by a rule of court does *not* bind the client; though in the very same case it is admitted, that in the courts of law that of the attorney does; and that if the decree be made to perform the award, and there appear in the decree only the assent of the solicitor, it is not incumbent on the plaintiff, in

[7] Hayes v. Hayes, H. 11 Car. B. R. Rol. Arb. E. 9. Cro. Car. 434.

[8] Bacon v. Dubarry, 1 Lord Raym. 246. 12 Mod. 129. Comb. 439. 1 Salk. 70.

(c) It is probably upon this ground, which is much strengthened by the words of the act of 1705, that in Pennsylvania it has been ruled in the Common Pleas that an attorney's agreement to refer binds his client. *Somers* v. *Balabrega*, 1 Dall. 164.

a bill of review for the reversal of the decree, to shew the want of assent in the principal; and that even the attendance of the solicitor, with counsel, before the arbitrator, on behalf of his client, will not bind the latter without his actual assent.[9]

It may well be doubted, however, how far the authority of this case would be recognized at present: the character of solicitor is equally known to the law as that of an attorney: their duty and their privileges are the same—the confidence reposed in them the same: they only differ in name, and practise in different courts.

If the husband submit to arbitration any thing of which he might dispose in right of his wife, the wife shall, after his death, be bound by the award. As if the husband and wife be possessed of a term in the right of the wife, as executrix of her former husband; and the present husband, and a stranger, who claims title to it, submit the interest and title of the lease to the award of certain persons, who award one part to the pretender, and the other to the husband and wife, the latter, after the death of the husband, shall be bound by this award.[1]

So, under a submission of all matters between a married man and another, the arbitrator may comprehend in his award a matter in dispute in the right of the wife. As if a woman be indebted to J. S. in a sum of money, as administratrix to J. D. and then marry: if the husband and J. S. submit all matters

[9] Colwell v. Child, 1 Rep. Ch. 104. 1 Ca. Ch. 86.

[1] Dict. 2. El. Rol. Arb. D. 1. with a quere.

between them, an award, comprehending the debt due by the husband and wife, though in the right of the wife and as administratrix, shall bind the husband, if the wife had assets; for in that case he is chargeable by the marriage.[2]

Under a similar submission, an award, comprehending a debt due to the wife as executrix, will bind the wife after her husband's death, as it will the husband himself during his life.[3]

But where a submission by the husband respects any property of the wife, which the husband by his own act cannot alien, an award which gives that property to another, it would seem, would not be considered as binding on the wife: as if the husband, among other things, submit the right of a manor, and the arbitrators award that the husband shall give up to the other party a deed, by which an annuity is secured to the wife out of the manor; this award cannot be enforced, because the right of the husband extends only to the accruing arrears of the annuity, and not to the annuity itself. But if the submission were jointly by the husband and wife, it seems not to be questioned in the book in which this case is reported, that both the husband and wife would be bound by this award:[4] yet some doubt might be raised, from the consideration, that the only mode by which the freehold interest of the wife can be transferred, is by the solemnity of a fine.

[2] Lumley v. Hutton, M. 15. Jac. B. R. M. 13. Jac. B. R. S. C. 1 Rol. Rep. 268. Rol. Arb. D. 2. Cro. Jac. 447. Morse v. Surry, 1 pt. Ca. Law and Eq. 212.

[3] 21 H. 7. 29. 6. cited Bridg. 91. Rol. Arb. D. 3.

[4] Vid. 21 H. 6. 19. and 1 Rol. Rep. 269.

The assignees of a bankrupt, succeeding only to the right of the bankrupt, must, it is evident, be bound by an award made before the bankruptcy, in consequence of a submission by him.

It was formerly thought, that an action of debt could not be maintained against an administrator on an award made between the plaintiff and the intestate, even though the award was in writing; but the reason given, though often in the ancient books used as an argument to impeach an award, seems to be altogether inapplicable: it is no other than this, that the intestate might have waged his law; or, in other words, by the intervention of certain ceremonies, sworn that he did not owe the money awarded.[5]

But this opinion has been since over-ruled; and it has been held, that an award creates a duty, which survives to the executor or administrator, and that they shall be compelled to perform the thing awarded to be done on the part of their testator or intestate.[6]

Whether, by the Roman law, the representative of the deceased was bound by an award made in the lifetime of his predecessor, does not appear very clearly, though the fairest interpretation of the law is, that he was.[7]

*Who may take advantage of an Award.*

It may safely be laid down as a general rule, that all those who would be bound by an award may take advantage of it, if made

[5] Bowyer v. Garland, Cr. El. 600.

[6] 2 W. and M. Dawney v. Vesey, 2 Ventr. 249. Vid. 1 L. Raym. 248.

[7] Nec utimur Labeonis sententiâ, qui existimavit, si arbiter, aliquem *pecuniam dare* jusserit, et is decesserit antequam daret, pœnam committi, licet heres ejus paratus sit offerre. Ff. l. 4, t. 8, s. 27.

in their favour, or in the favour of those in whose right they would be bound.

Therefore the assignees of a bankrupt may take advantage of an award made in favour of the bankrupt before his bankruptcy.

And for the same reason executors or administrators may take advantage of an award made in favour of their testator or intestate before his death.

## CHAPTER III.

### THE SUBJECT OF REFERENCE.

THOUGH at all times the courts have manifested a general disposition to give efficacy to awards, yet there are some cases in which they have refused them their protection; because the subjects, on which they were made, were not the proper objects of a reference to a domestic tribunal.

It is therefore essential, distinctly to point out what subjects of controversy the law permits to be referred, and to what others it refuses that privilege. The *general* answer to this question will be best obtained, by adverting to the great principle on which every reference is made, and the obligation imposed on the arbitrator, by implication, from the nature of his duty. That answer, indeed, will not exactly apply to all the cases that may occur: some of them can only be explained by the assistance of techinal reasons.

The only motive which can influence a man to refer any subject of dispute to the decision of an arbitrary judge, is to have an amicable and easy settlement of something which in its nature is uncertain. It would be contrary to the duty of an arbitrator to do any thing that were unjust between the parties; and if the demand

of the one upon the other were either certain in its original creation, or subsequently ascertained by any other means, an arbitrator would do manifest injustice were he to order, either that more should be given, or that less should be received, in satisfaction. It would therefore be nugatory to refer that to the decision of an arbitrator, in which the law, following the dictates of justice, will not permit him to make any change.

On these principles an award is of no avail, when made of debt on a bond for the payment of a sum certain, whether it be single, or with a condition to be void on the payment of a less sum, or of debt for arrears of rent ascertained by a lease, nor of covenant to pay a certain sum of money;[8] nor of debt on the arrears of an account taken before auditors, whether assigned by the master of the accountant, or by the court, in an action of account.[9] Nor of damages recovered by a judgment;[1] for in all these cases the demand is ascertained.

[8] 10 H. 7. 4. 4 H. 6. 17. Rol. Arb. R. 2. 5. Blake's case, 6 Co. 43, 44.

[9] 4 H. 6. 17. 6 H. 4. 6. a. Fitzh. Abr. 51. a. b. Rol. Arb. R. 1. 6. s. 1. 1 Lev. 292.

At common law, before either the statute of Marlebridge or Westminster the second, there were two methods of proceeding against an accountant: one by which the party to whom he was accountable, called, in the language of those times, his master, might, by the consent of the accountant, either take the account himself, or assign an auditor or auditors to take it, and then have his action of debt for the arrears. Or he might, in the first instance, have a writ of account, on which, after judgment, *quod computet*, auditors were assigned by the court, and final judgment pronounced on their report. The report of the auditors, in both cases, was considered as matter of record.

[1] Gouldsb. 91, 92.

It seems to be on the same principles that a submission cannot be made of a question relative to the detention of the title deeds of an estate, nor of the demand of an annuity; for, in the first case, the writings only are to be recovered; and, in the other, the annuity itself and the arrears. In some of the old books, however, reasons more technical, but less satisfactory, are assigned for these cases; that in the action of detinue of charters, neither the wager of law, nor outlawry, lies; and that it concerns land, and comprehends a warranty in itself, which is an inheritance; and that a writ of annuity is an action mixt with the realty.[2]

But an *action* of account may be submitted; for, till the account be taken, the sum remains uncertain.[3] So also a trespass for taking away the charters of an estate; for there uncertain damages are to be recovered for the injury of taking them away, though in detinue the recovery is only of the charters themselves.

And, in general, where the party complaining could recover by action only uncertain damages, the subject of complaint may be the object of a reference to arbitration: as any demand not ascertained by the agreement or contract of the parties, though the claimant demands a sum certain; as a *claim* of 5*l.* for different expences in the service of the other party.[4]

So, debt arising on a simple contract;[5] a demand of rent for use and occupation;[6] a complaint of slander;[7]

[2] 9 H. 6. 60. Fitzh. 51. a. Rol. Arb. V. 1. A. 6. V. 3.

[3] Rol. Arb. R. 4.

[4] Sower v. Bradfield, Cro. El. 422.

[5] 45 Ed. 3. 16. a. b.

[6] 4 H. 6. 17. b. Rol. Arb. V. 8.

[7] 1 Keb. 848.

trespass of every kind, whether personal or on the land of the complainant;[8] and, in general, all kinds of personal wrong, where, by the policy of the state, the injury done to the individual is not considered as merged in the public crime, or where it does not include an offence against the public manners.[9]

There is also a distinction with respect to demands arising on a deed. Where the demand is wholly ascertained by the deed at the time of making it, as it is by covenant, bill or bond, to pay a sum of money; there this certain demand cannot be avoided, but by matter of as high a nature, and therefore cannot be submitted to arbitration, as has been before mentioned: but when no certain duty accrues by the deed alone, but the demand arises from a wrong or default subsequent, together with the deed, as in the case of a bond to perform covenants, or covenant to repair a house, there the demand, being for damages for a breach, may be submitted.[1]

On the same principle, an action on the old statutes, for enticing away the plaintiff's servant, might have been answered by a submission of that injury, and an award in consequence of it; because the action was not grounded merely on the statute, but also on the departure of the servant, which was matter of fact.[2]

Most of those cases too, which cannot be submitted by themselves, may, when joined with other things of

[8] 13 R. 2.

[9] Vid. infra.

[1] Blake's case, 6 Co. 43, 44. Cro. Jac. 99. Rol. Arb. T. 1, 2, 3, 4, 5, 6.

[2] Rol. Arb. S. 2. Vid. statute of labourers, 23 Ed. 3. st. 1. and the other old statutes on that subject.

an uncertain nature; because then there is an uncertainty in the whole of the disputes;[3] as debt on a bond, whether single or with condition;[4] debt for arrears of rent ascertained by a lease for years;[5] damages recovered by verdict and judgment.[6]

But it was determined, in very early times, that the arrears of an account taken before auditors, assigned by the master of the accountant, cannot be referred even amongst other things; because, say all the justices, an award is not of so high a nature, as debt found before auditors, the latter being matter of record;[7] and they certainly would have said the same thing, had the case been that of debt found before auditors assigned by the court.

The same reason, however, applies, even in a superior degree, to the case of damages recovered by verdict and judgment; for these are surely matter of record, and of as high a nature as arrears found before auditors: and, perhaps, had the latter case remained to be decided in more modern times, it would have received a different determination.

However, in all cases where the demand arises on a deed, it would seem the submission must also be by deed; because a specialty cannot be answered but by a specialty.[8]

[3] Fhbt. 51. b. 6 H. 4. 6. a. b. Rol. Arb. R. 3. Tr. 22 Car. Faver v. Bates, S. C. Al. 4. Morris v. Creech, 2 Keb. 623. 659.

[4] Lumley v. Hutton, M. 13 Jac. B. R. H. 15 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharp, 1 Keb. 937.

[5] 10 H. 7. 4. Rol. Arb. R. 5.

[6] Gouldsb. 91, 92.

[7] 6 H. 4. 6. a. 4 H. 6. 17, 18. Fhbt. 51. a. b. Rol. Arb. R. 1. 6. S. 1. vid. 1 Lev. 292.

[8] 3 H. 4. 1. Brooke, 44. a.

Therefore, where A was indebted to B in 20*l.* by a single bond, and they submitted all matters between them, by parol, and it was awarded, that A should pay to B a less sum in satisfaction; it was determined, that though he had paid this smaller sum, according to the award, yet this was no discharge of the bond. But it was also held, that if the submission had been by bond, by which each bound himself to perform the award, A would have been obliged to pay the money awarded, otherwise he must have forfeited his bond of submission; and if he had paid it, or tendered payment, B would also have forfeited *his* bond of submission, by bringing an action on the single bond.[9]

Much doubt and uncertainty seem anciently to have prevailed on the question, "How far a dispute concerning land could be referred to the decision of an arbitrator; and how far, on an actual reference, the parties were bound by his award."

Thus, we are told, in one book,[1] that "it was said "by Grevill and Pollard, that land in variance on the "title, right, and possession, submitted to arbitration, "without other debates, and variances of other things "personal, are not arbitrable, nor have the arbitrators "authority to meddle with the title of real land only, "but such award is void; and so a bond, with con-"dition to obey such award, is void." The reporter, however, adds a *quere*, for that "others think clearly "the contrary, if there be such words as submit title "and possession: also they think," continues he, "that

[9] Lumley v. Hutton, H. 15 Jac. B. R. M. 13 Jac. B. R. Rol. Arb. B. 8. Coxal v. Sharpe, 1 Keb. 937.

[1] Keilway, 99, b.

"if I and another submit to an award of all *demands*, "without more, in the word demands are implied all "matters between us concerning the lands of both "parties, which are in variance between us."

In other places, we are told, that, "arbitrators cannot "make an award of freehold, and therefore cannot "award the freehold of one to another." This was said by Culpepper, "which nobody denied but Skrene, "who said, that an arbitrator cannot award frank-te- "nement without deed; but that if parties submitted "themselves to arbitration by deed indented, then the "award was good, and a man might plead it in bar, to "which no answer was given."[2]

Again, "a man cannot have a remedy to enforce "an award of frank-tenement, unless he has bond for "performance."[3] "The *right* of freehold cannot be "the subject of a reference; but the arbitrator may "award, that the one party shall infeoff the other in "satisfaction."[4] "An award that one shall infeoff ano- "ther in an acre of land, and immediately after deliver "up the charters, is good."[5] But Rolle says, "that ar- "bitrators cannot make an award of freehold, though "the submission be by deed or even by deed indent- "ed;" but his authorities[6] do not go so far.

So, he says, "that an arbitrator cannot make an "award of a lease for years, as to adjudge the land of "one to another, by which the interest and estate of "one shall be transferred to the other, because," says

[2] 14 H. 4. 18, 19. Brooke, 44. b.

[3] 9 E. 6. 26. Brooke, 53.

[4] Dict. per Moyle, cont. per Littleton. M. 9. E. 4. 44.

[5] 18 Ed. 4. 21, cited Rol. Arb. E. II. 2.

[6] 9 E. 4. 44. 14 H. 4. 19.

he, "it is a chattel real:" from whence it might be concluded that his opinion was, that any thing in the realty could not, by any mode, be referred to arbitration. But he cites no authority, nor does he make any distinction, whether the arbitrator cannot do this at all, or only that he cannot do it unless it be within the submission.

He also lays it down for law,[7] "that there cannot "be partition by an award;" but his reason seems only to extend to the manner in which the award of partition is expressed: it is, "that freehold does not "pass but by livery," which was true, before the introduction of the modern forms of conveyancing; and therefore an award, in such words as these, "The one "shall have one moiety of the lands in question, and "the other the other moiety," would not have been effectual.

But it appears, by a number of cases, adjudged even while these doubts were constantly expressed, that the real difficulty was how to *enforce* an award made on a reference of a dispute concerning land; for whenever the submission was by bond, it was almost universally held, that the party who did not perform the award forfeited the bond.

Thus, it is said, "if two, by bond, submit the title "of certain land to the arbitrament of a third person, "who awards, that the one shall levy a fine to the other "of that land, he must do it, otherwise he will forfeit "his bond."[8]

[7] 1 Rol. 242. l. 16. cites P. 1 Jac. B. Horton v. Horton.

[8] Keilway, 43, a. b. 45. b.

So, "where two bound themselves in mutual obli- "gations to stand to the award of certain persons, on "the right, title, and possession of 20 acres of land; "and the award was, that one of them should enter "and have possession of 10 acres to him and his heirs, "and that the other should have the remaining 10 "acres for life:" though an objection was taken to this award, as being only of *parcel* of the things submitted, yet that was overruled, and no objection taken to the submission, as being of freehold, nor to the award on any other account.[9]

In another place,[1] it is said, "that if the condition "of a bond be that the parties shall stand to the award "of J. S. concerning the *title* of certain land, and the "arbitrator award, that the one shall give a release to "the other of his right, and that the latter shall give "to the former 20*l.* in lieu of it; this is a good award." And Rolle,[2] citing the same case, says that "though "*such* an award be void to determine the right, and to "change the estate, because it is real, yet being within "the submission, the party is bound to perform it."

So, where there was a submission of the title of copyhold land, and an award that one of the parties, in consideration of money paid him by the other, should release to the latter all his right in the copyhold, at a certain day; and three years afterwards make further assurance; no objection was made to the *subject* of the award, though several were made to the award itself.[3]

[9] 19 H. 6. 6. b.
[1] 9 E. 4. 44.
[2] Rol. Arb. B. 14.
[3] Markham v. Jennings.—H. 4. Jac. B. R. Rol. Arb. K. 15.

Yet, the idea of there being something in the nature of real property, which rendered it an improper subject of reference, continued long to be entertained: "If an "award be made, says Coke, of a real thing, although "that be no bar in the action for the thing, yet if this "be performed, the bond is forfeited;"[4] by which, I suppose, he means, 'the bond of the party, who, not-'withstanding the award, and performance by the other, 'sues on the original cause of action, is forfeited by his 'so suing; unless, it must be supposed, that the word "not" is omitted before the word "performed," and 'then the meaning will be, that the party not *perform-'ing* the award will forfeit *his* bond.'

And so late as the time of William the third, it is observed, by one of the judges,[5] "that it is a question, "whether the title to land is submissible, since it is in "the realty;" and he is answered by the Chief Justice,[6] "that things in the realty may be submitted, as "well as things in the personalty; but that they could "not be recovered on the award."[7]

There seems to be something singularly absurd in the manner in which, in many cases, this opinion of the inarbitrable nature of real property is expressed: "any thing concerning the realty," it is said, "cannot "be referred; an arbitrator can make no award of it; "he cannot award the freehold of one man to another;" and yet, in the next sentence, it is frequently added, "but, if there be a bond to stand to the award, the "party who does not perform it forfeits the penalty;"

[4] 1 Rol. Rep. 270.
[5] Powell.
[6] Treby.
[7] Marks v. Marriot, 1 Ld. Raym. 115.

which is contrary to the principle which universally governs every other case on this subject; for in all other cases it is held, that if the award be void, the bond is not forfeited by non-performance.[8]

In none of the books, which I have had an opportunity of consulting, is there any reason given for this opinion; perhaps the principle on which it was founded had ceased to operate before any register was kept of the proceedings of the courts; it probably had its rise from the feudal restraints on the alienation of real property; at a time when the lord had an interest in the person of his vassal, who could not be changed without his consent; when the vassal had a reciprocal restraint on the change of his lord; and when the ancestor could not disinherit his heir; it was perfectly consonant to reason, that the possessor of land should not be permitted, by a reference to an arbitrary tribunal, to infringe on these collateral rights; and when, by the removal of the restraints on alienation, the principle on which the opinion was founded no longer existed, and was forgotten, the opinion itself still continued to be favoured.

In the Roman law, there is no question but that real property might be referred, and the parties bound by an award concerning it;[9] and indeed there appears to

[8] 22 H. 6. 46.

[9] Inter Castellianum et Seium, controversia de finibus orta est, et arbiter electus est; ut *arbitratu ejus res terminetur;* ipse sententiam dixit, præsentibus partibus, et terminos posuit: quæsitum est, an, si ex parte Castelliani arbitro paritum non esset, pœna ex compromisso commissa est? Respondi si arbitro paritum non esset in eo, quod utroque presente arbitratus esset, pœnam commissam.—Ff. l. 4. t. 8. s. 44.

be nothing in the nature of real property itself which makes it an unfit subject of arbitration, where no adventitious reason prevails to render it so.

It may therefore safely be considered as law, that where the parties might, by their own act, transfer real property, or exercise any act of ownership with respect to it; they may refer any dispute concerning it to the decision of a third person, who may order the same acts to be done which the parties themselves might do by their own agreement: therefore, when we are told that an arbitrator cannot make an award of freehold, that he cannot award the freehold of one man to another, or that partition cannot be by an award; we are to understand these expressions to mean no more than that land cannot be transferred, or a division made of it, by the mere magic of the words of the award; but that it is necessary that the award should order such acts to be done as would, if done by the voluntary agreement of the parties, amount to a proper transfer or partition at law.

Thus, where it appeared by the recital of an award, that the parties to the submission were joint tenants of certain land, and the award ordered that they should make partition by mutual conveyances, no objection was taken to the power of the arbitrator to order partition to be made; but to the uncertainty of the manner in which it was ordered, it not being pointed out what moiety or part the one should have, and what the other: but even this objection was over-ruled, and it was resolved, that, whereas they were joint-tenants before, they would now become tenants in common.[1]

[1] Knight v. Burton. 3 Anne. 6 Mod. 231.

And where the law did not require any particular solemnities, to transfer the possession from one to another, the words of the award alone have been held sufficient for that purpose; as where a controversy arose between two, concerning a lease of lands, and they submitted to the award of a third person, who awarded, that one of them should have the lands; this was held in evidence before a jury to be a good gift of the interest of the term; but it was likewise held, that, had it been, that the one should permit the other to enjoy the term; this would not have given an interest in it.[2] And in another book,[3] where the same case is cited, and the distinction here taken recognized, it is said, that if the arbitrators award *that the possessor shall hold the term*, it seems, that this would not bind the right of the other; for that the award does not extinguish the right there, as it does to pass the possession in the other case. I confess I do not see any thing material in these distinctions; and I apprehend, that since the statute of frauds,[4] such an award would not be sufficient to bind the parties, but that it must order a transfer of the possession, or a release of the right, by a written instrument.(*d*)

As real property cannot be transferred by the parties themselves, without deed, except by the old solemnities of a foeffment on the land, it seems to be a necessary consequence that, where that makes a part of the dispute, the submission, as well as the award, where the submission is by the act of the parties, must also be by deed.

[2] Trusloe v. Asewre, Cro. El. 223.

[3] Dy. 183, in marg.

[4] 29 Car. 2. c. 3. s. 1.

(*d*) Since the last publication of Mr. Kyd's Treatise a case has been decided in the court of King's Bench which, although it proceeds

It has been said, that all kinds of personal wrong may be submitted to arbitration, where, by the policy of the state, the injury done to the individual, is not considered as merged in the public crime, or where it does not include an offence against the public manners.

ceeds upon a principle hereafter noticed, has a particular application to awards of real estate, and is therefore proper for notice in this place.

In an action of ejectment the fiction precludes every plea but that of *not guilty*, and of course each party is entitled to set up under this issue any defence or ground of action which in other suits would be the foundation of a special plea or replication. There can therefore be no such thing in an action of ejectment as the plea of a *submission and award*, nor can the plaintiff reply it; but if *a submission and award* have been made of the title to lands in dispute, it will have the same effect in ejectment as if agreeably to the fiction it were strictly pleadable; that is, it will bind the parties, and will stop the plaintiff or defendant, as the case may be, from setting up the title against which the award has been made. In other words, although an award will not convey a right to lands, it will prevent either party from stirring the original controversy in an ejectment by concluding them from disputing the title affirmed by the award.

The case above referred to was thus: in ejectment for certain messuages and lands it appeared in evidence on the part of the plaintiff at the trial, that in the year 1799, a prior ejectment having been brought on the demise of the same lessors against this defendant, for part of the same premises which were leasehold, it was agreed to refer the matter to arbitration, and accordingly bonds of arbitration were entered into in consequence of which the premises were afterwards awarded to be delivered up to the lessor of the plaintiff; but the defendant not being satisfied with the award, applied to B. R. to set it aside, but without effect; notwithstanding which he still retained the possession of the premises, upon which this ejectment was brought. The defendant offered at the trial to go into evidence of his title; but the learned Judge (*Lawrence*) rejected it, considering him as precluded from disputing the lessor's title in this action by the award, to which the present parties had bound themselves to submit;

This exception was not originally dictated by any thing which had appeared in *our* books; it arose from that principle appearing in the civil law; but as it is founded in reason and good sense, it was supposed there could be no doubt that, if the question should ever occur in our courts, it would receive a similar determination.

submit; upon which the plaintiff recovered a verdict. A motion was made for a new trial, on the ground that the award, though prima facie evidence, was not conclusive between the parties, the subject matter affecting the freehold and inheritance of land, which could not be determined by arbitration according to 1 *Rol. Abr.* 242. l. 10. & 1 *Com. Dig. tit. arbitrament* D. 3. But if the award were admitted to be conclusive evidence of the title, it would indirectly determine the freehold and inheritance; and though but the judgment of a private person, it would have an higher effect than a judgment in ejectment, which is the act of the court, and is allowed not to be conclusive. Per CURIAM. "The award cannot have the operation of conveying the land; but there is no reason why the defendant may not conclude himself by his own agreement from disputing the title of the lessor in ejectment. The parties consented that the award of the arbitrator chosen by themselves should be conclusive as to the right to the land in controversy between them; and this is sufficient to bind them in an action of ejectment. Rule refused." *Doe on the demise of Morris & others* v. *Roseer*, 3 East, 15.

To the same purpose is a case decided at *Nisi Prius* in Pennsylvania, before *Shippen* and *Bradford*, Justices of the Supreme Court. In an ejectment for lands in Cumberland county, the plaintiff shewed an office title; the defendant set up an interfering office title, but relied principally upon an award made in an action of trespass, wherein he was plaintiff, and the present plaintiff was defendant, and the plea *liberum tenementum;* which award directed that a "division line between the farms of the parties should be run in such a manner as to leave this disputed land in the possession of the present defendant;" and the award was afterwards confirmed by the court. In charging the jury in the ejectment, the court say, "the great

As arbitrators, say the writers on the civil law,[5] have no power, but that which the parties can give them, we cannot submit to arbitration certain causes which the laws and good manners do not suffer to be exposed to any other event, but that which the natural authority of justice gives them, and which cannot be brought before other judges than those who are

[5] Domat. 1 vol. 225.

great objection to the plaintiff's recovery arises from the award and judgment. To be sure an award cannot give a right to land, but a report of referees will *settle a dispute about land* either in an ejectment or in an action of trespass. In the case of *Fox's lessee* v. *Franklin*, a similar report has been made and affirmed. Indeed such a report is more operative than a verdict; for a verdict in ejectment is not conclusive; but when parties chuse to adjust their disputes amicably, they generally agree that the award shall be final, and under such an agreement neither of them can hope again successfully to agitate the same points.** Under this charge the plaintiff suffered a nonsuit. *Calhoun's lessee* v. *Dunning*, 4 Dall. 120.

It is observable that in the last of the foregoing cases the award which was held to conclude the party against whose title it was made, was delivered under a rule of court *in an action* calculated *to try the title;* and in the first case it was an award under arbitration bonds, entered into by virtue of an agreement made *in a cause* of the same nature. Whether the court would give the same effect to an award made where no cause depended at the time upon the matter in controversy, has not perhaps received a decision; but as this effect is greater than would be given to a judgment in the very cause in which the reference took place, and from this circumstance seems to depend upon the nature of a submission and award, and not upon the character of the action, it is probable they would; and therefore there is some difficulty in reconciling with these decisions the following case.

In ejectment for 317 acres of land in Westmoreland county, the plaintiff produced what is called in Pennsylvania an office title, complete in every thing but a patent; and the defendant opposed to it a settlement upon the land, and an *award in his favour*, by four out of

cloathed with public authority. Thus we cannot submit accusations of crimes, such as murder, robbery, sacrilege, adultery, forgery, and others of the like nature; for on the one side the public interest is concerned, to have these crimes punished in a public manner; and on the other, the party accused can

of five arbitrators, to whom or a majority of them there was a submission by the defendant and the lessor of the plaintiff of their dispute respecting the land. The president charged the jury that the principal difficulty in the case was in the award If it was considered as an agreement of the parties, and the rule of equity was applied to it, that what ought to be done must be considered as done, it would operate as a *title* against the plaintiff. If it was considered merely as a verdict in ejectment it would be no bar to a further prosecution of the title; and as to *title* the English law says an award is not conclusive; he was therefore disposed to think that it should have no greater force than a verdict and judgment in ejectment; and the jury found a verdict for the *plaintiff*. Upon a motion for a new trial the defendant's counsel argued, that the submission and award *concluded* the parties; and that it also amounted to a *contract* with sufficient consideration, which ought to be considered in Pennsylvania as equivalent to a deed of the party under hand and seal, *passing the title*. The answer by the plaintiff's counsel seems to have been directed only to the last reason, and not to have noticed the ground that the parties were *concluded* by their agreement; and the president takes the same view of the argument; as in delivering the opinion of the court upon the motion, he says " a " verdict having been given for the plaintiff a motion has been " made to set it aside on the ground that the jury ought to have " been directed to consider the award *as decisive of the right of* " *these parties to this land*;" and he also says, " In the direction to " the jury I told them that considering this award as giving the " *right* it could not have this effect, for by the law of England *title* " *to real estate cannot be transferred by award*; and considering it " as giving the *possession*, it was not decisive, for one judgment in " ejectment is no bar to another ejectment for the same land;" and again, " considering it as a principle of English law that an award " cannot transfer title to real estate, I do not see how when an " award was given as *evidence of title* to real estate, consistently " with

neither defend his honour nor his innocence but in public, and before the judges who exercise the ministry of justice; and it would be contrary to good manners, and useless for the accused, to submit voluntarily to justify his innocence before arbitrators, who having

" with that principle, any other direction could be given to the jury." The president however proceeds afterwards to take a view of the subject more analogous to the cases of *Doe* v. *Rosser*, and *Calhoun's lessee* v. *Dunning*, and although he successfully maintains the position that an award will not operate *as a conveyance*, he proceeds to consider whether it was essential that it should so operate, in order to entitle it to more weight than had been given to it with the jury.

" The award," says the president, " is in June 1791. Dixon in " virtue of his location has a survey made in April 1773. *Morehead* " has a warrant in January 1785. Both therefore at the time of the " award had a claim on the state for a title. To settle the point " between them, to whom the state should give the preference, " they might enter into an agreement, and though this were by " parole, I think the executive agents of the state and the courts " of justice would hold it conclusive on them or at least on the " party out of possession, or they might submit their difference to " arbitration, and I think the executive agents of the state and the " courts of justice ought to hold the award conclusive on them, or " at least on the party out of possession. If the jury had been " directed to consider the award as conclusive, it would not have " been so much a decree of a specific performance of an award as " making it *a bar to a further prosecution of the claim submitted.* " I think therefore that in the direction to the jury sufficient weight " was not given to the award in this case, and therefore there ought " to be a new trial." The same case was however tried at a Nisi Prius in May 1796, before the chief justice M'Kean and Smith J. who held the award not binding and the plaintiff's title regular and fair, in consequence of which he had a verdict. *Dixon's Lessee v. Morehead*, *Addison's Reports*, p. 216.

The simple point in this case was, according to *Doe* v. *Rosser*, whether the plaintiff was not concluded by the submission and award from disputing the defendant's title in ejectment; the award not being offered as *evidence of title*, but to prevent the plaintiff from setting up the title which had been negatived by the award.

no share in the administration of justice, could neither justify nor condemn him.[6]

In Easter term, 1797, a case occurred in the court of King's Bench, in which this principle was expressly recognized.—One James Rant and others had, at the session for the county of Middlesex, held in the month of October preceding, preferred a bill of indictment for a riot and assault against one Hannah Coombs and others, who at the same session preferred a similar bill against Rant, and his party; both bills were found, and were called on for trial at the session held in December following; but by the consent of the parties on both sides, all matters in dispute between them were referred to arbitration: mutual bonds of arbitration were executed, which contained a proviso that the submission should be made a rule of the court of King's Bench; no award was made within the time originally limited by the bonds; the time was enlarged, as the successful parties alleged, by mutual consent; and an award was made within the enlarged time: the unsuccessful parties having procured the submission to be made a rule of court, moved to have the award set aside on an affidavit, which, among other things, stated that they had neither by themselves, nor their attorney, consented to the enlargement of the time: the counsel,[7] who was instructed to shew cause, though

[6] Julianus indistincte scribit; si per errorem de famoso delicto ad arbitrum itum est, vel de eâ re de quâ publicum judicium sit constitutum, veluti de adulteriis, sicariis et similibus; vetare debet prætor, sententiam dicere, nec dare dictæ executionem. Ff. l. 4. t. 8. s. 32. w. 6.

[7] The author of the present work.

of opinion that, for several reasons, the award could never by any mode of proceeding be enforced, yet thought he could successfully oppose the present rule, on two grounds: 1st, That it appeared from the affidavit on which it was obtained, that the court had no jurisdiction over the subject, as the consent to enlarge the time was denied.* 2dly, That a criminal prosecution could not be made the subject of reference.—He had hardly stated the fact of the submission by bond, when the court expressed a considerable degree of surprize that a criminal prosecution should be so submitted; they observed that it was usual, indeed, in prosecutions of this kind, before a verdict was given, or after verdict of conviction, and before sentence, for the parties to talk together by the recommendation of the court, and if they agreed, the court set a nominal fine; but the whole was done under the inspection of the court, and *their* sentence formally followed.—The rule was discharged.[8]

It is to be observed here that the objection to the propriety of the reference, arose not so much from the nature of the complaint, as from the form of the prosecution; for there can be no doubt that a personal

* Had the *successful* party procured the submission to be made a rule of court, and then moved to *enforce* the award by attachment, the denial of this consent would have been a proper answer to that application; but it seems hardly reconcileable to common sense to procure a submission to be made a rule of court, and then to move to set aside an award, made under the authority of that submission, on the denial of its existence.

[8] The King v. Coombs et al. on the prosecution of Rant, and the King v. Rant et al. on the prosecution of Coombs.

[8 T. R. 520. Watson v. M'Cullum.]

assault may in itself be the subject of arbitration, as well as any other trespass; and where it is made the subject of an action, instead of an indictment, it may with propriety be referred.

Notwithstanding this ready recognition of the principle in question, in the case just stated, it seems in the following to have been forgotten or overlooked.

Some considerable time previous to the year 1795, Stephen Phillips purchased of Lord Viscount Falkland, Henry Speed, and Delves Broughton, several annuities, the payment of which was ostensibly secured to him by assignments of several supposed estates alleged to be the property of those three persons.—Some time after the purchase, applications were made to the court of King's Bench to set the annuities aside, on affidavits sworn by Lord Falkland, John King, who in some part of the transaction had acted as the agent of the grantors, and one Alexander Livingstone: these applications, however, were unsuccessful, and Mr. Phillips having afterwards, as was alleged, discovered that all or the greater part of the estates assigned as a security, either had no existence, or did not belong to the parties who had taken upon themselves to assign them, instituted a prosecution by indictment against Lord Falkland, Mr. Speed, and Mr. King, for a conspiracy to cheat him of his money by falsely representing the three persons before mentioned as the owners of the supposed estates; three several indictments were also found on the prosecution of Mr. Phillips, against Lord Falkland, King, and Livingstone, for perjury assigned to have been committed in the affidavits before mentioned.—These four indictments stood for trial before Lord Kenyon at the sittings at Westminster after Hilary term in the year 1795.—On the indictment for

the conspiracy, the defendants were acquitted, whether on the real merits of the case, or on account of some defect in the indictment, or from want of sufficient evidence on the part of the prosecution, is immaterial for the present purpose: a proposition was then made from the bar that the subjects of dispute between the prosecutor and the several defendants should be referred to arbitration; this receiving the acquiescence of Lord Kenyon, and the consent of the parties, verdicts of acquittal, by his Lordship's direction, were entered on the three indictments for perjury.—Rules were then drawn up in all the four indictments, which stated, that "It was ordered by the court, by and with "the consent of the prosecutor and the several defen- "dants, their counsel, and attorneys, that it should be "referred to a person there named as arbitrator, to "settle all matters in difference between Stephen Phil- "lips, the prosecutor, and the *said several defendants*, in "the *said indictments*, and to settle and ascertain what "sum of money ought to be secured to the said Stephen "Phillips by the said defendants Lord Viscount Falk- "land, Henry Speed, Esq. and Delves Broughton, Esq. "and that it should be in the power and judgment of "the said arbitrator to settle and determine the nature "of such security to be given; and also to order and "determine what he should think fit to be done by the "parties respecting the matters in difference between "them, and that the court of King's Bench might be "prayed that this order might be made a rule of "court."[9]

[9] The King on the prosecution of Stephen Phillips v. Lord Falkland, John King, and Alexander Livingstone.

Had the defendants been acquitted of the criminal charges on the merits, but it had appeared in the course of the investigation that there were subjects of difference between them and the prosecutor, which might give rise to future litigation, those differences might have been referred to the decision of an arbitrator, by the recommendation of the judge and counsel, without violation of the principle which is now the subject of discussion; even then, however, it would have been improper in point of form that the reference should be by rule of court alleged to be made in the indictments; these were at an end by the acquittal of the defendants, and the court could have no authority to interpose in any disputes still subsisting between the parties:—But here, when the proposition to refer was made and accepted, the defendants remained charged with a gross crime, in prosecution of which the public interest was materially concerned, and no evidence had been offered of their guilt or innocence: in that situation, therefore, the reference, in substance as well as in form, has the *appearance* of a compromise of public justice under the sanction of a court; and if what was done in this case were to be considered as legally correct, it is apprehended it might be cited as an authority, not only that a criminal *prosecution*, but a *public crime*, might legally be referred to arbitration.

It is further laid down by the writers on the civil law, that causes which relate to the state of persons cannot be submitted to a private tribunal; as if the question were to know, whether a man were legitimate or a bastard—whether a gentleman or a plebeian. Nor can such causes be submitted to arbitration, the consequence of which may interest our honour or dignity

in such a way, that good manners do not allow us to submit the event of them, or to choose judges for deciding them.[1]

[1] Domat. 1 vol. 225. De liberali causa compromisso facto, recte non compelletur arbiter sententiam dicere: quia favor libertatis est, ut majores judices habere debeat; eadem dicenda sunt, sive de ingenuitate, sive de libertinitate quæstio sit: et si ex fideicommissi causâ, libertas deberi dicatur. Idem dicendum est in populari actione. Ff. l. 4. t. 8. s. 32. n. 7.

## CHAPTER IV.

### THE ARBITRATOR AND UMPIRE.

*Who may be an Arbitrator.*

EVERY one whom the law supposes capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or umpire; because he is appointed by the choice of the parties themselves, and it is their folly to choose an improper person;[2] but a person cannot be an arbitrator, who, by nature or accident, has not discretion; as one of non-sane memory, or one who is deaf and dumb, because being deprived of the use of those senses, which are more peculiarly the medium through which knowledge is conveyed to the mind, he cannot be supposed capable of judging; nor an infant, nor a person who is under the control of another: as a married woman, a slave among the Romans, or a villein in the times of villeinage; neither can a man attainted of treason or felony.[3] But with us an

[2] Com. Dig. Arbitrament. B.—parvi refert, ingenuus quis, an libertinus sit; integræ famæ quis sit arbiter, an ignominiosus. Ff. l. 4. t. 8. s. 7.

[3] Com. Dig. Arb. C.—In servum Labeo compromitti non posse scribit; et est verum. Ff. l. 4. t. 8. s. 7. Sed neque in pupillum, neque in furiosum, aut surdum aut mutum compromittetur, s. 9.

unmarried woman may be an arbitratrix,[4] though by the civil law she could not, it being contrary to the proper character of the sex, according to the ideas of Justinian, to intermeddle with the office of a judge.[5]

It is a general rule of law, founded on the first principles of natural justice, that a man cannot be judge in his own cause; and on this foundation the Roman law has expressly provided, that if a man be constituted arbitrator in a dispute to which he is himself a party, he cannot pronounce an award; adding this satisfactory reason, that he must, from the nature of the thing, either order himself to do something, or prohibit himself from asserting some claim; and that no man can either impose a command or a prohibition on himself.[6] There are, however, one or two cases mentioned in our books of reports, which seem to infringe on this

Cum lege Julia cautum sit, *Ne Minor viginti annis judicare cogatur*, nemini licere minorem viginti annis compromissarium judicem eligere: ideoque pœna ex sententia ejus nullo modo committitur. Majori tamen viginti annis, si minor viginti quinque sit, ex hac causa succurrendum, si temere auditorium receperit, multi dixerunt —s. 41.

[4] Vid. the Dutchess of Suffolk's case. 8 E. 4. 1. Br. 37.

[5] Sancimus, mulieres, suæ pudicitiæ memores et operum quæ eis natura permisit, et a quibus eas jussit abstinere, licet summæ atque optimæ opinionis constitutæ, in se arbitrium susceperint, vel si fuerint patronæ, etiamsi inter libertos, suam interposuerint audientiam, ab omni judiciali agmine separari, ut ex earum electione nulla pœna, nulla pacti exceptio adversus justos earum contemptores habeatur. Cod. l. 2. t. 56. s. 6.

[6] Si de re suâ quis arbiter factus sit, sententiam dicere non potest: quia se facere jubeat, aut petere prohibeat; neque autem imperari sibi neque se prohibere quisquam potest. Ff. l. 4. t. 8. s. 51.

principle, but which probably may admit of such a modification as to be reconcileable to it.

Serjeant Hards took a horse as a deodand from the bailiff of the archbishop of Canterbury, for which the archbishop brought his action, and that coming to a trial at the assizes in Kent, the Serjeant offered to refer the matter to the archbishop himself, which was accordingly done by rule of court; and the Serjeant afterwards applied to the court to have the award set aside, on the principle above mentioned; but the court thought the objection of no force; probably because the reference to the archbishop was by the Serjeant's own proposal, by which they thought he ought to be bound: perhaps, too, they thought, that the principle in question applies only to the case where a man takes on himself to judge in his own cause, without the consent of the opposite party. However this may be, it is certain, that on the authority of this case, cited from recollection by one of the judges,[7] and reported by him to have been approved of by Lord Chief Justice Hale, a subsequent case received a similar decision, though the circumstances are not mentioned.[8]

Another case is reported[9] of a submission by two on each side, to several arbitrators, of whom one of the two on one side was one, and an objection taken to the award on that account by his partner, when made defendant to an action on the bond of submission; and the objection was supported by another observation, "That it was a principal challenge to a juror, that he

[7] Dolben J.

[8] Matthew v. Ollerton, 5 W. and M. B. R. Comb. 218. 4 Mod. 226.

[9] Hunter v. Bennison, Hardr. 43.

had been an arbitrator between the parties in the cause:" but it does not appear that the court gave any attention to this observation; probably because they thought it inapplicable to the case in question. The circumstance of having been an arbitrator between the parties in the same cause is an objection to the juror, because he may be already prejudiced in the dispute; and the obligation under which the party was bound to stand to his award is at an end, before the cause can again be brought to trial by a jury, and does not estop him from objecting to the juror on account of a prejudice so naturally implied; but, by submitting to have his partner in the dispute one of the arbitrators, he had waived all subsequent objection, on that account, to his award.

The Roman law recognizes two kinds of arbitrators, those who are appointed by a formal submission, and act in the capacity of a judge, and those to whom it is simply referred to set a price on any thing which is the subject of sale; to estimate the value of a rent, to decide on the quality of a piece of workmanship, to settle the shares of gain and loss between partners, or to determine any question of a nature similar to these.[1] Arbitrators of the first kind had an uncontrolable authority, from which there was no appeal, where they kept within its limits, whether their award was an

[1] Arbitrorum genera sunt duo: unum ejusmodi, ut sive æquum sit, sive iniquum, parere debeamus; quod observatur, cum ex *compromisso* ad arbitrum itum est: alterum ejusmodi, ut ad boni viri arbitrium redigi debeat, et si nominatim sit comprehensa persona, cujus arbitratu fiat; veluti cum lege locationis comprehensum est, ut opus arbitrio locatoris fiat. Ff. l. 17. t. 2. s. 76, 77.

equitable decision between the parties or not, and therefore the party could never be invested with that authority: but in the latter case it was considered to be the meaning and intention of the litigants, that the matter in dispute should be referred to the judgment of persons of probity and skill in the particular subject, who were not permitted to exceed the bounds of reason and equity; and if they did, their decision was void: [2] in this case, therefore, there was no inconvenience in permitting one of the parties, by the consent of the other, to be an arbitrator of the dispute; and accordingly such a reference was frequently made. [3]

[2] Ea mens est personam arbitrio substituentium, ut quia sperent eum recte arbitraturum id faciant, non quia vel immodice obligari velint. Domat. 1 vol. 44. Si in lege locationis comprehensum sit, *ut arbitratu domini opus adprobetur*, perinde habetur, ac si viri boni arbitrium comprehensum fuisset: idemque servatur, si alterius *cujuslibet* arbitrium comprehensum sit, nam fides bona exigit, ut arbitrium tale præstetur quale viro bono convenit. Ff. l. 19. t. 2. s. 24.

[3] Si societatem mecum coieris, ea conditione, *ut partes societatis constitueres*, ad boni viri arbitrium ea res redigenda est: et conveniens est viri boni arbitrio, ut non utique ex æquis partibus socii simus, veluti si alter plus operæ, industriæ, pecuniæ in societatem collaturus sit. Ff. l. 17. t. 2. s. 6. Societatem mecum coisti, ea conditione *ut Nerva amicus communis partes societatis constitueret:* Nerva constituit, *ut tu ex triente socius esses, ego ex besse:* quæris, utrum, ratum id jure societatis sit, an nihilominus ex æquis partibus socii simus? existimo autem melius te quæsiturum fuisse, utrum ex his partibus socii essemus, quas is constituisset, an ex his, quas virum bonum constituere oportuisset: —arbitrium boni viri existimo sequendum esse: eo magis, quod judicium pro socio, bonæ fidei est. Unde si Nervæ arbitrium ita pravum est ut manifesta iniquitas ejus appareat corrigi potest per judicium bonæ fidei. Quid enim si Nerva constituisset, ut alter ex millesima parte, alter ex duabus mille-

The case of Serjeant Hards, and others of the same kind, would, in the Roman law, have been considered as more properly belonging to the latter class.

It is highly improper, however common it may be, for a person nominated as an arbitrator, to consider himself as the agent of the person on whose behalf he was nominated.[4]

It appears, however, to be no objection to an arbitrator, that he is related to one of the parties, or connected with him in any other way, which might raise a presumption of an inclination in his favour; for by consenting to the nomination of such a person, the other party has shewn his opinion, that such an inclination will not affect the justice of his determination.[5]

*Umpire.*

When a submission is made to the award of two or more, it is frequently thought prudent, in order to provide a remedy for the case of their finally differing, or not making an award at all, to insert a clause of agreement, that in such case the question shall be referred to the decision of a third person, who is called an umpire.

The nomination of this person is frequently made by the parties themselves at the time of the submission, and frequently left to the discretion of the arbitrators. In the latter case, the English law differs essentially from that which was conceived to be law by the

simis socius esset: illud potest conveniens esse viri boni arbitrio, ut non utique ex æquis partibus socii simus, veluti si alter plus operæ, industriæ, gratiæ, pecuniæ, in societatem collaturus erat. Ff. l. 17. t. 2. s. 76, 78, 79, 80.

[4] 1 Vez. Jun. 226.

[5] Quinetiam de re patris dicitur filium familias arbitrum esse: nam et judicem eum esse posse plerisque placet. Ff. l. 4. t. 8. s. 6.

opinion most prevalent among the Roman lawyers; for though they acknowledge it to have been a common practice to refer any thing to the decision of *two* arbitrators, yet they say, that "a submission to two, with a provision, that, in case of difference in opinion, they shall nominate a third," is not valid, because they may also differ in the object of their nomination: but at the same time they admit, that in case of a submission to two without such provision, the prætor, when they cannot agree in an award, ought to compel them to nominate a third person to decide between them.[s]

The English law expresses no such anxiety for the possible difference of opinion in the choice of an umpire; and, in fact, it is more usual to appoint two arbitrators with the power of this nomination, than any greater number: but it provides, that the choice shall be fair and impartial, and that it shall not even be left to chance; therefore, where two arbitrators, having such power by the submission, did not make an award within the time limited, and could not agree in the choice of an umpire, but threw *cross* and *pyle* which of their nominees should prevail, this was thought by the Master of the Rolls a sufficient reason for setting aside the umpirage made by the successful nominee; because an election, he said, was an act of the will and

[s] Si in duos fuerit sic compromissum, *ut si dissentirent, tertium adsumant*, puto tale compromissum non valere, nam in adsumendo possunt dissentire. Sed si ita sit, *ut eis tertius adsumeretur Sempronius*, valet compromissum: quoniam in adsumendo dissentire non possunt. Sed usitatum est, etiam in duos compromitti, et debet prætor cogere arbitros, si non consentiant, tertiam certam eligere personam, cujus auctoritati pareatur. Ff. l. 4. t. 8. s. 17. n. 5, 6.

understanding, but the arbitrators in this case had followed neither, but had trusted the matter to chance.[6]

There is no part of the law relative to awards, in which so much uncertainty and confusion appear in the reported cases, or on which so many contradictory judgments have been given, as on this respecting the umpire. The time when the power of the arbitrators ceases, and that of the umpire begins; the time when the umpire may be nominated, and the effect of his nomination, have, each in its turn, proved to be questions of sufficient magnitude to exercise and distract the genius of Westminster-Hall. The best way to discover some glimmering of light through this chaos of opinion will be, to consider minutely the different forms of submission by which the appointment of an umpire is regulated. It has already been observed, that he is either appointed by the express nomination of the parties at the time of the submission, or that the nomination is left to the discretion of the arbitrators. These are the leading forms, of which each has its subordinate distinctions. In each, the time limited for the umpire to make his umpirage has sometimes been the same with that limited for the arbitrators to make their award: in each, it is most usual, and seems most correct, to prolong the time beyond that period.

In the case of a prolongation of time, when the umpire has been either appointed by the parties, or nominated by the arbitrators, in consequence of a power given them for that purpose in the submission, the authority of the latter is determined, and that of

[6] Harris v. Mitchell, 2 Vern. 485.

## CHAPTER IV.

### THE ARBITRATOR AND UMPIRE.

*Who may be an Arbitrator.* EVERY one whom the law supposes capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or umpire; because he is appointed by the choice of the parties themselves, and it is their folly to choose an improper person;[2] but a person cannot be an arbitrator, who, by nature or accident, has not discretion; as one of non-sane memory, or one who is deaf and dumb, because being deprived of the use of those senses, which are more peculiarly the medium through which knowledge is conveyed to the mind, he cannot be supposed capable of judging; nor an infant, nor a person who is under the control of another: as a married woman, a slave among the Romans, or a villein in the times of villeinage; neither can a man attainted of treason or felony.[3] But with us an

[2] Com. Dig. Arbitrament. B.—parvi refert, ingenuus quis, an libertinus sit; integræ famæ quis sit arbiter, an ignominiosus. Ff. l. 4. t. 8. s. 7.

[3] Com. Dig. Arb. C.—In servum Labeo compromitti non posse scribit; et est verum. Ff. l. 4. t. 8. s. 7. Sed neque in pupillum, neque in furiosum, aut surdum aut mutum compromittetur, s. 9.

unmarried woman may be an arbitratrix,[4] though by the civil law she could not, it being contrary to the proper character of the sex, according to the ideas of Justinian, to intermeddle with the office of a judge.[5]

It is a general rule of law, founded on the first principles of natural justice, that a man cannot be judge in his own cause; and on this foundation the Roman law has expressly provided, that if a man be constituted arbitrator in a dispute to which he is himself a party, he cannot pronounce an award; adding this satisfactory reason, that he must, from the nature of the thing, either order himself to do something, or prohibit himself from asserting some claim; and that no man can either impose a command or a prohibition on himself.[6] There are, however, one or two cases mentioned in our books of reports, which seem to infringe on this

Cum lege Julia cautum sit, *Ne Minor viginti annis judicare cogatur*, nemini licere minorem viginti annis compromissarium judicem eligere: ideoque pœna ex sententia ejus nullo modo committitur. Majori tamen viginti annis, si minor viginti quinque sit, ex hac causa succurrendum, si temere auditorium receperit, multi dixerunt —s. 41.

[4] Vid. the Dutchess of Suffolk's case. 8 E. 4. 1. Br. 37.

[5] Sancimus, mulieres, suæ pudicitiæ memores et operum quæ eis natura permisit, et a quibus eas jussit abstinere, licet summæ atque optimæ opinionis constitutæ, in se arbitrium susceperint, vel si fuerint patronæ, etiamsi inter libertos, suam interposuerint audientiam, ab omni judiciali agmine separari, ut ex earum electione nulla pœna, nulla pacti exceptio adversus justos earum contemptores habeatur. Cod. l. 2. t. 56. s. 6.

[6] Si de re suâ quis arbiter factus sit, sententiam dicere non potest: quia se facere jubeat, aut petere prohibeat; neque autem imperari sibi neque se prohibere quisquam potest. Ff. l. 4. t. 8. s. 51.

## CHAPTER IV.

### THE ARBITRATOR AND UMPIRE.

*Who may be an Arbitrator.* EVERY one whom the law supposes capable of judging, whatever may be his character for integrity or wisdom, may be an arbitrator or umpire; because he is appointed by the choice of the parties themselves, and it is their folly to choose an improper person;[2] but a person cannot be an arbitrator, who, by nature or accident, has not discretion; as one of non-sane memory, or one who is deaf and dumb, because being deprived of the use of those senses, which are more peculiarly the medium through which knowledge is conveyed to the mind, he cannot be supposed capable of judging; nor an infant, nor a person who is under the control of another: as a married woman, a slave among the Romans, or a villein in the times of villeinage; neither can a man attainted of treason or felony.[3] But with us an

[2] Com. Dig. Arbitrament. B.—parvi refert, ingenuus quis, an libertinus sit; integræ famæ quis sit arbiter, an ignominiosus. Ff. l. 4. t. 8. s. 7.

[3] Com. Dig. Arb. C.—In servum Labeo compromitti non posse scribit; et est verum. Ff. l. 4. t. 8. s. 7. Sed neque in pupillum, neque in furiosum, aut surdum aut mutum compromittetur, s. 9.

unmarried woman may be an arbitratrix,[4] though by the civil law she could not, it being contrary to the proper character of the sex, according to the ideas of Justinian, to intermeddle with the office of a judge.[5]

It is a general rule of law, founded on the first principles of natural justice, that a man cannot be judge in his own cause; and on this foundation the Roman law has expressly provided, that if a man be constituted arbitrator in a dispute to which he is himself a party, he cannot pronounce an award; adding this satisfactory reason, that he must, from the nature of the thing, either order himself to do something, or prohibit himself from asserting some claim; and that no man can either impose a command or a prohibition on himself.[6] There are, however, one or two cases mentioned in our books of reports, which seem to infringe on this

Cum lege Julia cautum sit, *Ne Minor viginti annis judicare cogatur*, nemini licere minorem viginti annis compromissarium judicem eligere: ideoque pœna ex sententia ejus nullo modo committitur. Majori tamen viginti annis, si minor viginti quinque sit, ex hac causa succurrendum, si temere auditorium receperit, multi dixerunt —s. 41.

[4] Vid. the Dutchess of Suffolk's case. 8 E. 4. 1. Br. 37.

[5] Sancimus, mulieres, suæ pudicitiæ memores et operum quæ eis natura permisit, et a quibus eas jussit abstinere, licet summæ atque optimæ opinionis constitutæ, in se arbitrium susceperint, vel si fuerint patronæ, etiamsi inter libertos, suam interposuerint audientiam, ab omni judiciali agmine separari, ut ex earum electione nulla pœna, nulla pacti exceptio adversus justos earum contemptores habeatur. Cod. l. 2. t. 56. s. 6.

[6] Si de re suâ quis arbiter factus sit, sententiam dicere non potest: quia se facere jubeat, aut petere prohibeat; neque autem imperari sibi neque se prohibere quisquam potest. Ff. l. 4. t. 8. s. 51.

been shewn that one of them was dead, it might have been otherwise; and the whole court, except Twisden, were of opinion, that, if it had been averred that the arbitrators had disagreed as to the terms of their award, and had declared they would intermeddle no further with the subject, the umpire might have proceeded within the time.

And in a subsequent case,[5] the opinion was totally over-ruled, and those cases which proceeded on it denied to be law; the reason on which it was founded being considered as unsatisfactory: for it was said, if the arbitrators did in fact make an award within the time allowed to them, that should be considered as the real award; and if they made none, then the umpirage should take place: and there was no confusion as to the concurrence of authority with respect to the time. The umpire had no concurrence absolutely, but only conditionally if the arbitrators made no award within their time.—This was meant to apply equally to the case where the umpire was confined to the same time with the arbitrators, and to that where a further time was given to him.

Where the nomination of the umpire is left to the arbitrators, it seems[6] anciently to have been the prevailing opinion, that they could not proceed to this nomination before the last moment of the day when their own authority expired. While that opinion prevailed, unquestionably the power given them in the submission, to nominate an umpire, when the latter

[5] Chase v. Dare, P. 33. Car. 2. [6] Vid. the cases cited infra. Sir T. Jones 168.

was expressly limited to the same time, must have been a mere nullity; and where further time was given him, an award could not possibly be made by him before the expiration of the time allowed the arbitrators, and therefore no question could be raised on the subject.— This opinion however was relinquished about the time of James the first; and a nomination of an umpire before the expiration of the time allowed to the arbitrators, was first supported in favour of those submissions where no additional time was given to the umpire; therefore where the submission was to two, with this clause, "Nevertheless if they do not end it within ten days, they shall nominate another, who shall end it within the ten days," it was held, that if they thought they could not agree within the ten days, they might appoint another, who might make an umpirage *within* the ten days.[7]

The same indulgence was afterwards extended to the case, where further time was given to the umpire, as to the power of the arbitrators to nominate him before the expiration of their own time; thus where A and B submitted to the award of J. S. provided his award should be made on or before the last day of May next ensuing; and if he made no award on or before that day, then they should stand to the award of such person as should be nominated by J. S. to be made before the tenth of June after: the arbitrator, *on* the last day of May, nominated an umpire, who made an

[7] Fyall v. Varier, M. 11. Jac. 1 Lev. 174. cited 1 Ld. Raym. B. Godbolt. 241. Rol. Arb. P. 3. 671. 12 Mod. 512. —S. P. Twisleton v. Travers,

award before the tenth of June, and this was held to be good; though it was objected, that the arbitrator had the whole of the last day of May to make his award in;[8] but the reason given for the determination in these cases is, that by the nomination of an umpire, the authority of the arbitrators is at an end, and that the reason which induced them to make the nomination, might be, that they felt themselves unable to make an award within the time.—The judgment in this case has been since confirmed by similar resolutions; but the reason is something different, being merely, that the arbitrators having made no award within the time, the umpirage shall be good.

Sometime before this last case, occurred that of Jennings and Vandeput, of which the circumstances were these:[1] The submission was to the award of four merchants, provided it should be made and delivered in writing, before the twentieth of July following; and if they could not agree, then to the award of such an umpire as they should name, provided he made his umpirage in writing before the twenty-fifth of July following. The arbitrators made no award, on or before the 20th of July; but three of them, on the 18th, by their writing dated on that day, nominated an umpire, who took the charge upon him, and the fourth agreed to this nomination on the 21st.—The umpire made his umpirage before the 25th, according to the proviso in the submission: an action being

[8] Watson v. Clement, M. 24 Car. B. R. Rol. Arb. P. 5.

[9] Elliot v. Cheval, Lutw. 541, 544. Tr. 11 W. 3.

[1] Cro. Car. 263. T. 8. Car.

brought on the award, and a verdict given for the plaintiff, it was moved in arrest of judgment, that the nomination of the umpire, before the 20th of July, was void; for that the arbitrators had the whole 20th day in which to make their award, and that they could not nominate an umpire till afterwards; but the objection was over-ruled, because there was no compleat nomination until the agreement of the fourth arbitrator with the other three, and the writing was not to have effect till that time. But it was also observed, that if the nomination of the umpire had been compleat, before the expiration of the time for making their award, yet it would have been good, as no award was made by them within the time.

On the authority of this latter observation, Twisden J. held[2] that where the arbitrators have authority to nominate an umpire, they may do it before the expiration of the time for making their award, and that such nomination does not extinguish their authority. But, at the same time, he seems to have considered it as a necessary consequence of the continuance of their authority, that the umpire has no power to interfere, notwithstanding any refusal of the arbitrators to decide the question, till the time allowed to them be expired: and he went so far as to assert, that if such a power were given to the umpire by the submission, it was void in its construction, for the same reason as had been given in some of the preceding cases, "that two could not have a several jurisdiction at the same time;

[2] In Delaval v. Maschall, 29 Car. 2. 1 Mod. 274. Sr. T. Raym. 205. 1 Lev. 285. there called Denovan v. Mascall.

and that the arbitrators, though they had once declined their office, might resume it whenever they pleased within their time."

In the case before the court, the condition of a bond was to stand to the award of two, who were to make their award on or before the nineteenth of February, with a proviso in these words, "and if they do not make an award *before* the nineteenth of February, then I impower them to choose an umpire; and by these presents bind myself to perform his award." The umpire chosen according to this power made his umpirage *on* the nineteenth of February, and the other judges then present[3] assenting to the principles laid down by Twisden, concurred with him in deciding, that the umpirage was void.

However, notwithstanding this case of Twisden's, the idea still continued for a considerable time, that by electing an umpire, before the expiration of their own time, the arbitrators gave up their authority to make an award.—The following case occurred late in the reign of William the third:[4] A submission was "to stand to the award of two, provided it should be made on or before the twenty-ninth of June, and if they made no award, then to the umpirage of such person as they should choose," without limiting any time for the umpirage. The arbitrators chose an umpire on the 29th of June, who then made his award; it was objected, in the terms of former cases, that the arbitrators had chosen the umpire too soon, because they

[3] Rainsford and Morton. 1 Salk. 71. 1 Ld. Raym. 671.
[4] Mitchel v. Harris, 13 W. 3. 12 Mod. 512.

had chosen him before the determination of their own authority, they having the whole of the day, in which they might make their award; and that, notwithstanding their having chosen an umpire, they might still make an award, before the expiration of the time allowed to them.

But it was answered and resolved, by the Chief Justice, with the concurrence of the rest of the court, that by the submission, the arbitrators had an election to make an award, or to choose an umpire by such a day, and that by doing the latter they had determined their election, and, together with that, their authority. But he distinguished between this case, and that where the umpire is named in the submission; for that, in the latter, the umpire could not make an award before the expiration of the time allowed to the arbitrators.

And it is said to have been settled in the Common Pleas, so late as the eighth of George the second, that arbitrators cannot proceed on a reference, after they have once named an umpire, for that then their authority ceases, though the time for making their award be not expired.[5]

It is now however finally determined, that arbitrators may nominate an umpire before they proceed to consider the subject referred to them; and that this is so far from putting an end to their authority, that it is the fairest way of choosing an umpire.[6] And it is in fact not unusual for the parties to make it a condition

[5] Rep. Pract. in C. B. 116. Pasch. 8 G. 2. Danes v. Monsay, cited Vin. Abr. Arbit. P. 18.

[6] 2 Term Rep. 645.

in the submission that the umpire shall be chosen by the arbitrators, before they do any other act.

They may also, when a further day is given to the umpire, and the choice left to them in general terms, choose him at any time *after* the expiration of their own time, provided it be before the time limited for him.[7]

Considering the intention of the parties, as the proper criterion on this subject, independently of decided cases, there does not appear the semblance of a reason, why, in the case where no further time is given to the umpire than to the arbitrators, an umpirage made before the expiration of that time, should not be supported, whether the umpire be named in the submission, or the choice of him be left to the arbitrators: it seems to be acting against the very policy of the law, in recognizing these domestic jurisdictions, to consider that as nugatory which the parties have manifestly shewn to be their intention, unless that intention be contrary to some established maxim of law plainly applicable to the subject, or repugnant to common sense: what maxim of law is contradicted by a wish in the parties to have a dispute decided within a certain limited time, either by two, or by a third, in case of a failure by the two, it is difficult to discover; and that such a thing is repugnant to common sense it will hardly be asserted.

The conclusion from the whole of the cases taken together, seems to be in favour of such a submission, and of an umpirage made according to it.

[7] Burdet v. Harris, 3 Keb. 387. 2 Mod. 169. Freem. 378. Adams v. Adams,

While the opinion prevailed that, by nominating an umpire the arbitrators renounced their office, and could not afterwards make an award, there was some foundation for a distinction between the case of an umpire expressly named in the submission, and that where his nomination was left to the arbitrators, when a further time was given to the former beyond that which was limited to the latter.—In the second case there could be no apprehension from that concurrence of authority so much dreaded in the first, and no inconvenience could arise from supporting an umpirage made before the expiration of the time allowed to the arbitrators; but now that that opinion is exploded, the distinction which was founded on it necessarily fails; that which is law in the one case must be considered as law in the other. It has been seen, that in the case where the umpire is expressly named in the submission, the old opinion, that the umpire could not make an umpirage before the expiration of the time allowed the arbitrators, was over-ruled, by the case of Chase and Dare: that case, though not always attended to in the subsequent cases, has not been directly contradicted; but the general current of decisions, since that time, has rather tended to confirm it. There does not appear any direct authority that, where the nomination of an umpire is left to the arbitrators, and a further time given him, he may, when nominated before the expiration of that time, make his umpirage within it. But there is a case which shews, that, had that question arisen, it would probably have been decided that he might.

The plaintiff and defendant had, in the beginning of December, entered into bonds of arbitration, with

a proviso, that the arbitrators should make their award by the 17th of January following; and if they should not, then the parties bound themselves to stand to the umpirage of such person as the arbitrators should indifferently choose, provided it should be made by the first of February. They chose an umpire on the 24th of December, who made his umpirage on the 14th of January. The counsel for the defendant, who impeached the umpirage, confessed, that a case between Ogel and Cogdel, which in circumstances exactly resembled this, had been lately decided in the Common Pleas, and that the court had shewn an inclination to consider the umpirage as binding; but he said, that the judgment of the court had proceeded on another point. Not depending much on this circumstance, however, he took an exception to the form of the affidavit on which the application was founded for enforcing the award: the court thought the exception fatal, and therefore said they did not think it necessary to declare any final opinion on the point of law; yet, they said, they had not much doubt but the umpirage might be maintained.[s]

Upon the whole, there seems to be little reason to doubt, that in all cases where an umpire is introduced into the submission, whether he be there expressly named, or his nomination be left to the arbitrators; whether the time allowed to him be the same with that allowed to them, or extend beyond it, he may, unless in the latter case restrained by express words, or by plain implication, make his umpirage

[s] Cowel v. Waller, Trin. 5 Geo. 2. 2 Barnard. K. B. 154.

before the expiration of the time allowed to the arbitrators.

The only remaining question on this point is, whether, in an action, or on a summary application to enforce this umpirage, it must not be shewn expressly to the court, that the arbitrators, before the umpire actually undertook the business, neglected, or refused, to proceed, or expressly renounced their authority: unless this was in fact the case, it is manifest the umpire could not take upon himself to decide, the meaning of the parties being clearly to have recourse to an umpire, only in case of default in the arbitrators.—But it would seem, that the very circumstance of no award having been made by the arbitrators within their time, is a foundation for presumption, that they had actually declined making a decision on the subject, and that therefore an allegation, that they had in fact made no award, is sufficient. And this opinion is apparently justified by the terms in which the judgment of the court is given, in the case of Chase and Dare, the leading case on this point.

From the opinion that the arbitrators, having once elected an umpire, had executed their authority, it has been thought to follow as a necessary consequence, that if they elected one who refused to undertake the business, they could not elect another. In the case of Trippet and Eyre,[9] which occurred in the Common Pleas, in the first of William and Mary, this opinion was strenuously maintained by the Chief Justice,[1] in

[9] Trippet v. Eyre, 1 W. and M. in C. B. 3 Lev. 263. 2 Vent. 113.

[1] Pollexfen.

opposition to the rest of the court, who supported the contrary position. The reasons on which he founded his opinion were these: first, he said, the nature of an authority was such, that, when once executed, it was determined, and the parties to whom it was given had no further power: the arbitrators, therefore, having once named an umpire, could not name another, though the first refused; because, secondly, the person first named, though he had refused, might still have proceeded if he had pleased; for no case could be put of a man, vested with a bare authority, being concluded, by his refusal, from afterwards executing it; and, therefore, if the second were to be considered as well nominated, there would be a concurrence of authority in several persons to make an award, which, on the authority of the old cases of Barnard and King, and Barber and Giles, he said the law would not permit.

These arguments were answered by the other three judges in this manner: that they were to consider the penning of the condition of the bond, which was, "to stand to the award of such umpire as the arbitrators should nominate," which could not be confined to the circumstance of barely naming a man, but must be taken to be an effectual nomination, by the person named accepting of the office; and his refusal made it amount to no more than a bare proposal to him, which did not conclude the arbitrators from naming another. It was true, that an authority once fully executed was determined, and could not be executed again; but the condition to stand to the award of such person as the arbitrators should name, could not, they said, be with propriety called an authority; the terms imported rather a description or qualification of the person who

was to make the award, than an authority conferred on the arbitrators; yet, admitting the condition to amount to an authority, there was no complete execution; and if the person authorised make a void, or ineffectual execution of his authority, he may execute it again. If a letter of attorney were to deliver seisin, and the attorney delivered it within the view, which was not a good execution of his authority, that would not conclude him from delivering seisin afterwards upon the land: a writ of possession was executed by the sheriff in delivering possession of a house, and afterwards it was discovered that a person was hidden in a room of the house, on which he was turned out, and the sheriff delivered possession again, which was resolved to be well.[2] It could never be the meaning of the parties, that if the arbitrators named a man who refused to take upon him the office of umpire, they should be concluded from naming another.

With respect to the opinion, that the person first named might afterwards have taken upon him the umpirage, notwithstanding his refusal, it might be answered, that admitting that to have been the case, if he had done it before the effectual nomination of another, yet it was clear he could not have accepted the office of umpire, after such effectual nomination: a second nomination took away the effect of the first; and if, before they had named another, the first had taken on himself the office, that would have prevented them from proceeding to a second nomination, and therefore there could be no concurrence of authority.

[2] Palm. 289.

As to the cases cited by the Chief Justice, relative to this latter point, these were cases, in which the umpire was named in the submission, and therefore could not apply to the present; and had, besides, been expressly over-ruled by that of Chase and Dare. But, where the nomination was left to the arbitrators, without further time given to the umpire, it had been decided, according to the best report of the case,[3] that, on an allegation that the arbitrators *refused* to make any award, the umpirage would have been good—On these grounds judgment was given for the plaintiff—Yet, notwithstanding the good sense apparent in the reasoning of the three justices, Lord Chief Justice Holt held, not long after, that having once chosen an umpire, the arbitrators had executed their authority, and therefore could not choose another, though the first refused, unless the nomination was under a condition that he should accept, for then he was no umpire till the condition was fulfilled: but Justice Rokeby doubted the soundness of this distinction; because, he said, every election implied a condition that the office should be accepted. Is it necessary to add, that good sense, on the present question, is at variance with the opinion of the two Chief Justices? That the selfishness of parties, and their desire to defer the payment of a just demand, should prompt them to bring such a question before a court, is not surprising; the wonder is, that grave and learned judges should be able to persuade themselves that there was any ground for raising it.

[3] Copping v. Hurnard, 2 Saund. 129. 1 Salk. 70. 1 Ld. Raym. 222. 12 Mod. 120.

[4] Reynolds v. Gray, 9 Will. 3.

When the person to whom the parties have agreed to refer the matters in dispute between them has consented to undertake the office, he ought to appoint a time and place for examining the matter, and to give notice of such appointment to the parties, or to their attorneys: if the submission be by rule of reference at *nisi prius*, the respective attorneys should set down the names of the witnesses proposed to be examined before the arbitrator on a piece of paper, and deliver it to the crier, who will swear them at the bar of the court: the parties also, if that be part of the rule, must be likewise sworn; but if this precaution be neglected, both witnesses and parties must be sworn before a judge. It is usual for the plaintiff's attorney to obtain the order of reference from the associate or clerk at *nisi prius*, and attend the reference to have an appointment; and that being obtained, to subscribe it to a copy of the order of reference, and serve it on the defendant or his attorney: but if he fail in these respects, the defendant's attorney may take the same steps which he ought to have done: and this frequently becomes necessary, when the plaintiff, by the circumstances appearing at the trial, begins to apprehend that the matter may go against him. (*e*)

*Proceedings by Arbitrators.*

The parties must attend according to the appointment, either in person or by attorney, with such witnesses, and such documents, as they may think necessary to substantiate their respective claims. The arbitrator is then to examine those witnesses and documents, as far as he may find such examination necessary or proper, to enable him to form a decided opinion on the merits of the case: he may also examine the parties

(*e*) Under the rule of court in Pennsylvania, it is not usual to swear either parties or witnesses. The same latitude of inquiry, and the same exemption

themselves, or either of them, if he see good reason for so doing; or he may call for any other information he may judge necessary.

If the matter be long or intricate, or if he cannot satisfy himself with respect to the decision he ought to give, he may adjourn the matter from time to time, giving notice, as at first, of the time and place of every subsequent meeting; provided, that when a time is limited in the submission, he make his award within that time.—Where no time is limited, he may, by the English law, take what time he pleases, unless either of the parties specially request him to make an award within a reasonable time, and, in case of refusal, revoke his submission; for the parties will not be bound by an award, after such revocation.[6] Where a time is limited, he cannot make an award after that time, unless it be prolonged. When the submission is by the act of the parties, without the intervention of a court, that prolongation can only be by their mutual consent. If the submission was by bond, conditioned to be made a rule of court, according to the statute, or by reference at *nisi prius;* the submission, or the rule of reference, may first be made a rule of court; and then, if the parties consent to have the time enlarged, the court will grant leave for the enlargement, as of course: when it is not suspected by the party who undertakes to make the application, that there will be any opposition from the other, it is sufficient to give notice to him of his inten-

[5] Diem proferre vel presens, vel per nuncium, vel per epistolam potest. Ff. l. 4. t. 8. s. 27.

[6] Vid. ante, p. 32, 33.

tion from the strict rules of evidence, are allowed to arbitrators under a rule, as to arbitrators under a submission out of court. "As to the kind "of evidence which the referees may hear," says President Shippen, "there always has been, and must necessarily be in this kind of tribunal, a "very great latitude. The parties generally unassisted by counsel are permitted to relate their own stories, and confront each other; their witnesses

tion; and, on an affidavit of that notice, the court will grant the rule; at least, if the other party consent by counsel, as is usually the case.—But if any opposition be apprehended, the best way of proceeding for the party who wishes to enlarge the time, will be to apply, on an affidavit, stating the circumstances on which he conceives the time ought to be enlarged, for a rule on the other party, calling on him to shew cause why it should not: if the rule be ultimately granted, the party, on whose motion it was, must have it drawn up with the proper officer, and serve a copy of it on the arbitrator; and, on procuring from him an appointment of another time for hearing the parties, serve the rule, with a copy of the appointment on it, on the opposite side.

In the Roman law, it was not unusual, for a clause to be inserted in the submission, giving the arbitrator a power, in case of necessity, to prolong the time; and then he might do it without a new authority from the parties; but where no such clause was inserted he could not do it without their consent.[7] The provisions of

[7] Si arbiter, cum in compromisso cautum esset—ut posset diem proferre, diem protulit, Labeo ait, valere prolationem.—— Hæc autem clausula, *diem compromissi proferre* nullam aliam dat arbitro facultatem, quam diem prorogandi: et ideo conditionem primi compromissi neque minuere, neque immutare potest. Ff. l. 4. t. 8. s. 25.——Arbiter ita sumptus ex compromisso, *ut et diem proferre possit*, hoc quidem facere potest: referre autem contradicentibus litigatoribus non potest. S. 33.—Arbiter ex compromisso sumptus, cum ante diem, qui constitutus compromisso erat, sententiam dicere non posset, diem compromissi proferri jusserat; alter ex litigatoribus dicto audiens non fuerat: consulebatur, possetne ab eo pecunia ex compromisso peti? Respondi

" nesses are heard even without an oath, *unless the contrary is stipulated, or* " *the referees require it.* Books and papers are inspected and examined by " them without regard to their being such as would be strictly evidence in " a court of law." *Hollingsworth* v. *Leiper*, 1 *Dall.* 161.

The

that law however were such, that it was not in the power of the arbitrator, from negligence or design, to deprive the parties of the benefit intended by their submission, by an unnecessary and unreasonable delay; for every man who took upon himself the office of arbitrator, might in general be compelled by the prætor to decide between the parties within a reasonable time; unless he was some superior magistrate actually in office, or unless he could shew some satisfactory reason why he ought not to be compelled: as if he would swear that he had not yet been able to form a decisive opinion on the subject; that he had been defamed by the parties; or that a mortal enmity had arisen between himself and them, or one of them: or that he was prevented by the infirmities of age; or by ill health since he had undertaken the office; or that he was prevented by the pressure of his own affairs, or his necessary attendance on the duties of some public employment; if no time was limited by the submission, he might at any time be compelled to fix a day, by the consent of the parties, for taking the matter into consideration.—If he excused himself on account of attendance on public duty, his excuse would have been admitted, if there was no clause in the submission empowering him to prolong the time, but if there was, then he might be compelled to prolong it. And even if there was no clause of that kind, yet if the time

non posse: ideo quod non esset arbitro compromissum, *ut id haberet.* S. 50.—Arbiter nihil extra compromissum facere potest et ideo necessarium est adjici de die compromissi proferenda. Cæterum impune jubenti non parebitur, 32. n. 21.

The rule of court generally specifies the number of days notice necessary to entitle either side to proceed with the reference *ex parte;* and unless it allows of notice to the *attorney*, the notice of the time and place of meeting must be served upon the *party* himself, or the award will be set aside. *Rivers* v. *Walker*, 1 *Dall.* 81.

limited was nearly expired, and the parties agreed to continue their submission to him, he could not otherwise be excused, on account of a public office, than by consenting to decide under a fresh submission.—If the time was expired, without any award made, and the parties again agreed to refer the matter to the same person, then, if he could not shew, that it was not owing to any default of his, that the matter was not decided, he was obliged to undertake it anew; if he could, he was of course excused.[s]

[s] Et quidem arbitrum cujuscunque dignitatis, Prætor coget officio, quod susceperit, perfungi: etiamsi sit consularis: nisi forte sit in aliquo magistratu positus, vel potestate, Consul forte vel prætor: quoniam in hoc imperium non habet. Ff. l. 4. t. 8. s. 1. n. 3. Nam magistratus superiore, aut pari imperio, nullo modo possunt cogi: nec interest ante, an ipso magistratu arbitrium susceperint. Inferiores possunt cogi. S. 4.—Proinde si forte urgeatur a Prætore ad sententiam dicendam: æquissimum erit, si juret *sibi de causa nondum liquere*, spacium ei ad pronunciandum dari. S. 13. n. 4.—Licet Prætor districte edicat, *sententiam se arbitrum dicere coacturum*, attamen interdum rationem ejus habere debet, et excusationem recipere causâ cognitâ: utputa si fuerit infamatus a litigatoribus; aut si inimicitiæ capitales inter eum et litigatores, aut alterum ex litigatoribus intercesserint; aut si ætas aut valetudo, quæ postea contigit, id ei munus remittat, aut occupatio negotiorum propriorum, vel profectio urgens, aut munus aliquod reipublicæ. S. 15. Et si qua alia incommoditas ei post arbitrium susceptum incidat. S. 16.—Si compromissum sine die confectum est: necesse est arbitro omnimodo dies statuere, partibus scilicet consentientibus, et ita causam disceptari. Quod si hoc prætermiserit, omni tempore cogendus est sententiam dicere. S. 14.—Arbiter judicii sui nomine, quod publicum aut privatum habet excusatus esse debet a compromisso: utique si dies compromissi proferri non potest. Quod si potest, quare non cogat eum, cum potest, proferre, quod sine ulla districtione ipsius in-

The English law has made no similar provisions against the neglect of duty in the arbitrator; but it has secured each of the parties against the voluntary procrastination of the other, by permitting the arbitrator, on due notice given, to proceed without his attendance;[9] and if the arbitrator, from the nature of the case, should find that inconvenient, it enables the willing party, in the case of a reference by rule of *nisi prius*, or by rule of court according to the statute, to press his opponent by an application to the court for a rule to shew cause why he should not attend the arbitrator, or why the latter should not be directed to make his award, without such attendance. Thus, where on a trial at *nisi prius* it appeared, that the demand of the plaintiff arose on a long and intricate account, which in almost every article was impeached by the defendant, who also set up a counter demand of the same nature by way of set-off; it was referred by consent, and, the plaintiff neglecting to carry in his vouchers to the arbitrator, before the time limited for making the award, the time was several times enlarged, till at length the defendant, after upwards of six months

terdum futurum est? si tamen uterque velit eum sententiam dicere, quamvis cautum non sit de die proferenda, non alias impetret, quia judicium habeat, ne cogatur, quam si consentiat denuo in se compromitti: Hæc, scilicet, si dies exitura est. S. 16. —Si, cum dies compromissi finiretur, prolato die, litigatores denuo in eum compromiserint, nec secundi compromissi arbitrium receperit: non esse cogendum recipere, si ipse in mora non fuerit, quo minus partibus suis fungeretur. Quod si per eum factum, est æquissimum esse, cogi eum à prætore sequens recipere. S. 21. n. 5.

[9] Waller v. King, Ca. in Law and Eq. 2 pt. 63.

delay on the part of the plaintiff, made an application to the court, on an affidavit, stating these circumstances, for a rule to shew cause why the plaintiff should not carry in his vouchers within a certain day, and why the time should not be further enlarged, or why, on the plaintiff's further default, the arbitrator should not be directed to proceed on hearing the defendant alone; the rule was granted without hesitation, and the plaintiff, instead of shewing cause against it, peremptorily undertook to deliver in his vouchers within the time specified.[1]

In this respect the Roman law is something similar to ours, for the party by not attending, and thereby preventing the arbitrator from making his award, forfeited the penalty of his submission.[2]

Where an umpire is appointed, and he has occasion to interfere, his duty is the same as that of the arbitrators, and therefore it has been held, that he cannot proceed on their report, but must hear the whole matter from the parties themselves, or at least, by proper notice, give them an opportunity of being heard, in the same manner, as if the arbitrators had never examined the matter, or as if he himself had been originally appointed sole arbitrator.[3] And if the submission be in the common form, the arbitrators cannot decide on one part of the case and leave the rest to the umpire; for he has the whole authority

[1] Hetley v. Hetley, in the Exchequer, M. 1789.

[2] Siquis litigatorum defuerit; quia per eum factum est, quo minus arbitretur, pœna committetur. Ff. l. 4. t. 8. s. 27. n. 4.

[3] 39 H. 6. 9. Rol. Arb. P. 7.

which they had:[4] thus, where the arbitrators determined the whole of the matters referred to them, except one single point, which related to an account of interest; and, in order to settle that, nominated an umpire, according to the power given them by the submission; the umpire took the facts to be as the arbitrators reported them, and made his umpirage on the interest account only; and on both these accounts, the court set the umpirage aside.[5]

The authority of this case, however, from the character of the reporter, as well as from the circumstance of its appearing to have been decided in the sbsence of the Chief Justice, and one of the other judges, is not much to be relied on; and the reasons given for the decision are not very satisfactory. Where the arbitrators have agreed on the facts, and only differ on a single point, either with respect to the law arising on those facts, or the extent of the recompence to be made by one party to the other; or even where they agree on some facts, but differ with respect to others, unconnected with the first, there seems to be no good reason, why the umpire, if he think proper, may not take those points on which the arbitrators agree, to be as they report them. The nature of his duty is only to make a final determination on the whole subject of dispute, where the arbitrators cannot do it; and by adopting their opinion, as far as they agree, and incorporating it with his own on the other points, he effectually makes that final determination; in fact, it is not uncommon for an umpire to act in this manner.

[4] 39 H. 6. 11. b. per Prisot. Rol. Arb. P. 8.

[5] Tasker v. Keary, 2 Barnard. 317.

Let this practice, however, be right or wrong, yet, as the whole authority, both of the arbitrators and umpire, is regulated by the submission, and depends entirely upon it; if that be of several distinct matters, with a proviso, that if the arbitrators should, by the time limited, make no award of the whole, or of some parcel, then that the umpire shall have power, in the respective cases, to make an award of the whole, or of the remainder. On such a submission, it has been said, that if the arbitrators make an award of part, and not of the rest, then the umpire may make an award of the rest; the whole put together shall be considered as one award, and good, if not inconsistent in its several parts, or at least shall have the same effect as if the whole had been made by one; because it was made according to the authority given by the submission.[6]

A case of more recent date confirms this reasoning. The parties had referred all matters in difference to two persons as arbitrators, or, in case of their disagreement, to another as umpire; the arbitrators regularly heard all the evidence; but disagreeing in their conclusion, stated the evidence to the umpire, on which he made his award without re-examining the witnesses: after he had made the award, the party against whom it was made applied to him to hear the evidence himself, and on his refusing, moved the court of King's Bench to set the award aside: but the court thought that as no application had been made to the umpire to examine the witnesses before he had made his award, the rule should be discharged with costs.[7] (*f*)

[6] 39 H. 6. 11 b. per Prisot. Rol. Arb. P. 8.

[7] Hall v. Lawrence, 4 Term Rep. 589.

(*f*) This doctrine has been formally denied in two cases decided in the

Though the words in the submission, which regulate the appointment of an umpire, be not perfectly correct, but might, from the grammatical order in which they stand, seem to imply, that those named as arbitrators, and he who is named as umpire, should all join together to make an award, yet an award made by the first, without the participation of the latter, will be considered as satisfying the terms of the submission.

The condition of an obligation was, to stand to the agreement of A and B, "being arbitrators chosen for

the Supreme Court of Pennsylvania, and the law as laid down in the case of *Tasker* v. *Keal y*, established in this state.

The first was the case of *Falconer* v. *Montgomery & others*. It was a replevin for fifteen hogsheads of rum, and the matters in dispute were referred to two persons with power to choose an umpire if they disagreed. The referees met, and both sides were fully heard, the evidence being all in writing, and no part of it rejected. The plaintiff, however, objected to the consideration and decision of any other matter than the claim to the rum, while the defendant insisted upon an investigation of all the commercial transactions between the parties. The referees divided in opinion upon this proposition, and appointing an umpire they stated to him *in the absence of the parties*, the facts as they had previously appeared to them. The umpire then examined the accounts produced to him (the parties being still absent) concurred with the referee who thought the reference confined to the dispute about the rum, and signed with him a report in favour of the plaintiff. But the other referee declined joining in the report.

An exception was taken to the report, "that the umpire had not heard *from the parties themselves*, their respective allegations and arguments upon the merits of the controversy."

Per

that purpose, to end a controversy between the obligor and obligee, and J. S. being umpire for both parties." In this case it was held,[s] that an award made by A and B, without J. S. was valid; for though the words appeared at first sight uncertain, yet, as it was the common practice, it was said, to appoint an umpire to make an end of the matter, if the arbitrators could not agree, this should be so taken, and the words "J. S. being umpire," should be taken as an affirmative nomination of him as umpire.

[s] M. 12 Car. B. R. Osborn v. Roydon, on a writ of error on such judgment in the court of Kingston upon Thames.—Rol. Arb. P. 6

Per CURIAM. "The case of *Hall* v. *Lawrence* was decided in 1792. It is not therefore binding upon us as an authority, and upon principle we cannot accede to the decision. The plainest dictates of natural justice must prescribe to every tribunal the law that "no man shall be condemned unheard." It is not merely an abstract rule or positive right; but it is the result of long experience and a wise attention to the feelings and dispositions of human nature. An artless narrative of facts, a natural and ardent course of reasoning by the party himself, will sometimes have a wonderful effect upon a sound and generous mind; an effect which the cold and minute details of a reporter can neither produce nor supplant. Besides, there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction; there is scarcely an argument that may not be elucidated so as to ensure success, or controverted so as to prevent it. To exclude the party therefore from the opportunity of interposing in any of these modes, (which the most candid and the most intelligent but an uninterested person

The condition of a bond was, to perform the award which four, named as arbitrators, with the umpirage of a fifth, should make, concerning the title of certain lands. The four named, as arbitrators, together with the fifth, as umpire, made an award concerning the premises: an objection was taken to the condition, that it was repugnant in itself; that an umpire was a judge by himself, and could not be joined with the arbitrators, their authority being distinct. Whether this ob-

person may easily overlook) is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition. Under these impressions we are unanimously of opinion that the report of referees must be set aside." 4 *Dall.* 232.

The second case was that of *Passmore* v. *Pettit & Bayard*, 2 *Dall.* 271.

This case came before the court on exceptions to the report of referees, who had appointed an umpire; and the report was unanimously set aside for reasons appearing in the judgment of the court; the first of which was as follows: "When an umpire is chosen by referees he stands in the same situation precisely as the referees themselves, both with respect to powers to be exercised, and duties to be performed. He may examine, and he ought to examine the witnesses and the documents for himself, in the presence of the parties without relying solely upon the information or facts reported by the referees. This rule was settled in the case of *Falconer* v. *Montgomery;* and it is highly important to the administration of justice that it should be observed. It has not been observed upon the present occasion, and therefore the report cannot be confirmed."

jection was considered as having any weight does not appear; for we have only the report of the argument of the defendant's counsel, without answer or judgment from the court. It may be observed, however, that it is perfectly immaterial, whether the parties formed an accurate idea of the distinct offices of an arbitrator and an umpire, their meaning having been clearly, that the first four, with the assistance and approbation of the fifth, should make an award, and that, being made by all five, satisfies their intention.[9]

It has indeed been adjudged, that "if the submission be to the award of four, and if they cannot agree, then to the umpirage of a fifth," the five cannot join to make one award; though it was, at the same time, admitted, that "if the submission be to four, *and* the umpirage of a fifth," an award made jointly by the five will be good.[1] But this case has since been held to be absurd, and that the joining of the arbitrators with the umpire is but surplusage; their approbation, which is shewn by joining with him, does not render the instrument, purporting to be his umpirage, in any degree less the act of his judgment.[2]

By the Roman law, where there was an unequal number of arbitrators, it was not necessary that all should concur in the award; the judgment of a majority was sufficient to satisfy the terms of submission, though no express provision was made to guard against a difference of opinion. That precaution was seldom taken, but in the case of a submission to two,

[9] Hunter v. Bennison, Hardr. 43.

[1] 1 Bulst. 184.

[2] Soulsby v. Hodgson, 1 Bl. Rep. 463. East, 4 G. 3. K. B.

and then it was not unusual to express it in the alternative, to stand to the award of the one or the other: but it was held, that, in the common case of a submission to three, two could not make an award in the absence of the third; because the latter, had he been present, might have drawn over the others to his opinion.[3]

In this respect the law of England is somewhat different: for unless it be expressly provided in the submission, that a less number than all the arbitrators named may make the award, the concurrence of all is necessary; and where such a proviso is made, all must be present, unless the rest having notice do not attend.

Matters in difference were, by consent of parties, referred to three, with a proviso that they, or any two of them, should make an award before a certain time: an award being made by two in favour of the plaintiff, the defendant moved to have it set aside; objecting, that two had not a jurisdiction without the third. On

[3] In impari numero idcirco compromissum admittitur, non quoniam consentire omnes facile est, sed quia etsi dissentiant, invenitur pars major, cujus arbitrio stabitur. Ff. l. 4. t. 8. s. 17. n. 6. Si, in tres fuerit compromissum, sufficere quidem duorum consensum, si presens fuerit et tertius: alioquin, absente eo, licet duo consentiant, arbitrium non valere; quia in plures fuit compromissum, et potuit præsentia ejus trahere eos in ejus sententiam, n. 7. Sed si ita fit compromissum, *arbitratu Titii aut Seii fieri:* Pomponius scribit et nos putamus, compromissum valere, n. 4. Si plures arbitri fuerint, et diversas sententias dixerint:—licebit sententiæ eorum non stari, sed si major pars consentiat, ea stabitur, alioquin pœna committetur: inde quæritur, si ex tribus arbitris unus quindecim, alius decem, tertius quinque condemnent cui sententiæ stetur? et Julianus scribit quinque debere præstari; quia in hanc summum omnes consenserunt, s. 27. n. 3.

shewing cause against this motion, it appeared, that the third arbitrator had sufficient notice of the meetings of the other two, and might have attended if he would. The court observed, that it was agreed by both sides, that if the third had attended, two might have made an award: two had a jurisdiction, but their meetings ought to be according to the rules of law. If the third had been present, his reasons might have altered the opinion of the other two; he was not therefore to be excluded by fraud; nor were the two to act without the third's having an opportunity to be present; but where the third had sufficient notice, as in the present case, and would not attend, the meeting of the two was regular, and their authority sufficient.[4] (*g*)

It was once a question of great difficulty, whether, when the submission was by bond, without providing that the award should be delivered or notified to the parties, it was incumbent on the arbitrator to give notice, or whether the parties did not forfeit their bonds by not taking notice of it at their peril. In the reign of Edward the fourth this question was agitated, in a case remarkable for nothing else than the many laboured arguments on one side and on the other; and for its having been argued three times by all the judges in the Exchequer chamber, without their being able to come to any decided opinion. It may not, perhaps, be thought improper to state the circumstances of the case, and give a summary of the arguments, that it may appear with what difficulty many points have been established, which afterwards appear so plain, that we

[4] Dalling v. Matchett, Barnes 57.

(*g*) In the case of *Kingston* v. *Kinkaid & others*, in the Circuit Court U. S. for Pennsylvania, at April sessions 1806, a rule was entered to refer the cause to three referees or *any two* of them. It appeared upon exceptions to the

are at a loss to conceive how the mind could ever have entertained a doubt upon the subject.

The dutchess of Suffolk brought an action of debt on bond, to which the defendant pleaded, that the condition of the bond was, that if he, the defendant, should stand to the award of the dutchess concerning all matters in difference between him and one B. H. then the obligation should be void, provided that the award were made before the feast of All Saints, and written and sealed with the seal of the dutchess, and delivered to the parties *demanding it;* that, in fact, on the fifth of January the dutchess awarded, that the defendant should pay to B, on the fourth of March then following, twenty pounds, and in April another sum, and several other things: that on the 10th of April next after the fourth of March before mentioned, the defendant hearing of the award having been made, went to the dutchess, and demanded it in writing, and had it; and that he had performed it in all things except the payment of the sum which ought to have been paid on the fourth of March, and insisted that he ought to be excused of that, because he had not notice. Against the plea, it was argued, that it would be against reason that the arbitrators should be driven to give notice to the parties, because they had no advantage, but only a trouble; that it was the business of the parties to be constantly attendant on the arbitrators, and to know when the award was made; that if it was a hardship, the defendant should forfeit his obligation, by not performing that which he did not know; it was his folly to bind himself in that manner: that a man might be bound by his own deed to take notice, at his peril, of many things to which reason and the law

the report that the three referees met often upon the subject, but as one could not agree with the other two, upon the important points of the dispute,

would not compel him: that if a man were bound by obligation to make amends to another for all trespasses committed by him, it was not necessary for that other to give him notice of them, he must take notice of them at his peril: that if one man bound himself to attend another every time the other came to a certain manor, it was not requisite that the other should give him notice every time he went to the manor, he must take notice of it at his peril: that if a man were bound by recognizance to appear on a particular day before the King himself, wherever he should be in England, which means to appear in the King's Bench, which is ambulatory, and attendant on the King, he must be on that day wherever the court shall be, without notice from any body: that if I take a house for a term of years, I am only bound to repair it; and if it fall down from the weakness of the timber, I am not bound to rebuild it; yet, if I had bound myself to leave the house in as good a condition as I found it, I must rebuild it: that if I command my servant to buy certain goods for me, or constitute a man my factor for that purpose, in such a case I shall be charged for whatever goods they buy, though they never come to my hands, and though I have no notice of the purchase: that if I make a man my bailiff of my manor, and give him power to let the lands of it, in that case, if he let an acre, and do not give me notice of it, if I enter into that acre, and trample down the grass, the lessee shall have an action of trespass against me, though I had no notice that it was let: so, if a man were bound to pay a certain sum to another after the death of his father, and the father should die in a desert, without the knowledge of the son, yet the latter must take notice

pute, he said it was unnecessary for them to call upon him again, and he withdrew. The two referees afterwards proceeded in the matter without him

of it, and pay the money, otherwise the bond will be forfeited: so, it was said, if a man were arrested, and found bail to the sheriff for his appearance on the day of the return of the writ, in that case, if the defendant became sick, so that he could not have him at the day, yet they should not be excused to the sheriff.

Beside these arguments, from the analogy of other cases it was urged, that an award was, by common intendment, a matter of notoriety, of which the party must, at his peril, take notice; and if that were not so, then any one, when he perceived that the award was likely to go against him, might conceal himself, in order to avoid notice.

In favour of the plea it was argued, that an award was in the nature of a judgment, which could not be given but in the presence of the parties; it was therefore the duty of an arbitrator, like a good and upright judge, to give notice to the parties when he was to make his award; and that, if one of them avoided that notice, it might on the other side be shewn that he absented himself for the purpose: and with respect to the assertion, that he was bound by his own act to take notice of the award, and that it was his folly if he submitted to the arbitration of one who would not give him notice; all the cases cited on the other side differed materially from this.—The man who was bound to make amends to another for trespasses committed by him, cannot insist on notice of any trespass, because they must necessarily be within his own knowledge.—He who was bound to attend another every day he should come to a certain manor, was bound to take notice of the day, which it was in his power to do, because it was a matter that must be notorious; but,

him at different meetings, and framed their report. The Court held the conduct of the referees to be regular, and their report not to be impeachable for this cause. To the same point, vid. *Kunckle* v. *Kunckle*, 1 Dall. 364.

in the present case, the arbitrator might make his award, and put it in his pocket.

As to the recognizance in the King's Bench, every man might easily know a thing so notorious as the place to which the court moved; and, by general intendment of law, every man was bound to know it. The case of the house falling down had no analogy to this, for it could not possibly fall down without the tenant's knowledge. Those of the servant, the factor, and the bailiff, admitted of one answer: he who acts by another acts by himself, and therefore he must be supposed to know what the other has done. The case of the man who was bound to pay a sum of money at the death of his father could not be compared to this; there was nobody who was bound to give him notice, or could do it; he must take notice of it himself, because every man's deed was to be construed most strongly against himself: but, in the present case, the obligation could not be forfeited before the award was made; and, as to him, it was as if not made, till he had notice of it. In answer to the case of bail to the sheriff, it was said, that if the defendant were sick, they were excused, for that his *death* before the return was clearly a discharge of the bond: it was, however, denied on the other side, that the case of sickness was like that of death. It might, however, have been said, that they might still have brought him into court, notwithstanding he was sick; and now that it is understood, that nothing but entering bail above will satisfy the bond for appearance, they may enter an appearance though the defendant be sick.

Beside answering these cases, several were insisted on as being more analagous to the present question,

which all tended to shew, that a man shall not be bound by any thing of which he had not notice, nor to do a thing impossible; and it was strongly urged, that it was impossible for a man to pay money at a day which had elapsed before he had notice of the award; and this was compared to the case of an award of money to be paid on a day before the submission, which it was confessed was void. That case, however, is clearly distinguishable from the present; for there the thing is impossible from the beginning, but here it becomes impossible only from the want of notice at the time of making the award: and indeed the whole question seems to depend more on principles of general reasoning, than on any anology it may bear to cases cited on the one side or on the other.

The impossibility of performance for want of notice seems altogether out of the question, for the defendant, by a constant application to the arbitrator, might have known *when* the award was made, if the latter had been willing to inform him; and if, in fact, she had made her award, but either said that it was not made, or refused to deliver it till the day of performance was past, that would clearly have excused him. But the true criterion is, whether, from the nature of his duty, the arbitrator be bound to give notice of the award to the parties, without any condition of that kind expressed in the submission; or whether the parties themselves must, at all events, take notice of the time when he makes the award; and considering the subject in this light, these observations seem to have weight.

The duty of the arbitrator, we have seen, is to give notice to the parties at what time and place he will sit to hear their complaints, and that it is their duty to

attend him on such notice; but it is absurd to suppose that they are to go of their own accord every day to know when he will be attended, or whether he has yet made his award. When, indeed, the day appointed in the submission is come, it may be reasonable that they should call upon him, because that day is within their own knowledge; and if the award be not then made, his power is at an end. The true distinction, therefore, seems to be this, that if the award be made before the day limited in the submission, the party shall not be bound by any thing awarded to be done before that day, unless he has notice, but that he must take notice, at his peril, of any thing ordered at the day.[5] And there is an assertion of counsel, to which the court assent, that though the arbitrator make his award *before* the day, yet, if he give no notice of it to the party, it is void. This was said, in a case of debt, on a bond for the performance of an award, provided it were made before a certain feast, without any proviso that it should be notified to the parties; but it had not its effect, because the want of notice was not properly pleaded, the defendant having, in his plea, denied that any award was made before the day appointed; and, on an award made before that day being set forth in the replication, having rejoined that he had no *notice* of the award before that day, which the court held to be a departure from his plea.

It is true, that in the eighteenth of Edward the fourth, it is said by three justices, "that where an award is made, the parties must take notice of it at

[5] 8 E. 4. 1. Br. 37. [6] Keilway, 175.

their peril, and that this had been before adjudged in the King's Bench in the same King's reign." It is true, that in the first of Henry the seventh, to an action on a bond, the defendant shewing the condition to have been to stand to an award, provided it were made *before* a certain day, pleaded that the arbitrators gave him no notice of any award made *before* that day, and that the court held clearly "that this was not a good plea, because having bound himself to *perform* the award, he was *bound* to take *notice* of it," and that they distinguished between this case and *that* where a proviso was added to the condition of the bond, that the award should be made; for "that then such a plea would have been good."

It is also true, that Lord Coke adds the authority of his name to these cases, and says, "that so is the law without question;" but he is clearly mistaken when he says, "that this is against a sudden opinion in the eighth of Edward the fourth;"[9] no decided opinion was in fact given at that time, notwithstanding the number of times the case was argued, and the variety and extent of the arguments.

The same doctrine is also considered as established law in many other books;[1] but that may well be admitted without impeaching the soundness of the distinction before made. The cases in which the point is decided seem, from the manner of pleading, to have related to a breach of the award in some thing awarded

[8] Brian, Vavisor, and Catesby, 18 Ed. 4. 18 a.

[9] 1 H. 7. 5.

[9] 8 Co. 92. b.

[1] Vid. Cro. El. 97. Cro. Car. 132, 133.

to be done *after* the day appointed for making it; and the other books, in which the doctrine is recognized, only mention it as established law, without reference to any particular case.

The Roman law did not impose such a hardship on the parties, for the arbitrators were not only obliged to give them notice of the time when they intended to make their award, but to pronounce it in their presence; and, if on notice given for that purpose, either of the parties did not attend, he forfeited the penalty of the submission, but no award could be made, unless it had been specially expressed in the submission, that sentence might be pronounced in the absence of one or of both of the parties.

Where the submission is not by bond, there can be no question but the arbitrators must give notice of their award, otherwise the parties are not bound to performance; and indeed this seems, by the whole tenor of the arguments in the case of a submission by bond, to be taken for granted: and where the submission *is* by bond, it has long been the practice to guard against the consequences of want of notice, by inserting a proviso in the condition, not only that the award shall be made, but that it shall be delivered to the parties by a certain day; and then the bond will not be forfeited by non-

[2] Si quis litigatorum defuerit; quia per eum factum est, quo minus arbitretur, pœna committetur. Proinde sententia quidem dicta non coram litigatoribus non valebit; nisi in compromissis hoc specialiter expressum sit, ut vel uno, vel utroque absente, sententia promatur: pœnam autem is qui defuit, committit, quia per eum factum est, quo minus arbitretur. Ff. l. 4. t. 8. s. 27. n. 4.

performance, unless the party not performing had notice: and if such a submission be made by the plaintiff on one side, and two defendants on the other; if the award be made before the day, and delivered to the plaintiff and one of the defendants, but not to the other; this will not be sufficient: so, neither, it is said, will it be sufficient, where there are two persons on one side, and two on the other, and where the proviso is, that the award be delivered to each of the parties, if it be delivered to one on one side, and one on the other, for "that the word *party* is to be intended of the whole party."[3]

But it has been adjudged, that "a proviso that the award should be *delivered* by a certain day is satisfied by the pronouncing of a parol award, unless it was also provided, that it should be in writing. Thus, in Dyer,[4] a case is reported where the submission was in these words, "so that the award be made and *delivered* before a certain day:" to an action on the bond, the defendant protesting that no award was made, pleaded that the arbitrators did not deliver in *writing* any award; but judgment was given against him, because he had not denied that a *parol* award was pronounced; for the court held, that a *parol* delivery was sufficient.

But whether a proviso, in these words, "so that the award be made and *ready* to be delivered," can be satisfied by a parol award, has been thought a question of more difficulty.

[3] Hungate's case, 5 Co. 103. Cro. El. 885. Mo. 642. pl. 885.

[4] 218. b. Pasch. 3 El. Rot. 927. The record of this case is said to be in the new book of entries, tit. Delt. pl. 10. fol. 126.

An action was brought on a bond for performance of an award, in the condition of which it was provided, that it should be made and *ready* to be delivered to the parties, or such of them as should be ready to receive it: the defendant pleaded that no award was made; the plaintiff replied, and set forth a *parol* award, averring, that it was *ready* to be delivered according to the terms of the condition: to this the defendant demurred, insisting, that the words "ready to be delivered," necessarily imported that the award was to have been in writing; and, in support of this, his counsel cited a case which he said had been lately decided in the Common Pleas, and was directly in point,[5] and insisted much on Hungate's case before mentioned from Coke. On the other side it was urged, that the word "delivery" was to be understood according to the subject to which it was applied; that in common language a message was said to be delivered, and a man was said to deliver himself well, when he expressed his thoughts with elegance and grace; that if the proviso had been, that the award should be made in writing, the delivery must have been manual; but no such restraint being imposed in the present case, an oral delivery was sufficient, and in support of this was cited the case in Dyer, which, it was said, was full in point.

It may be observed, however, that that case is *not* so directly in point as was here alleged, the proviso there being, that the award should be *delivered*, not that it should be *ready* to be delivered. The court, at first, seemed inclined to think, that a parol award

[5] Wood v. Ardist, Tr. 1 Ann.

could not properly be the object of delivery, but that the words must be understood of a delivery in writing: afterwards, however, Lord Chief Justice Holt, having looked into the case in Dyer, and the record of it in Coke's Entries, said they were very strong authorities for the plaintiff; that the award might have been made in the absence of the parties, and delivered, or pronounced over again in their presence; and if so, what *may* be *delivered*, may be *ready* to be delivered. Powell J. however, said, that if the words had been only, "so as it be made and delivered," he would have taken the delivery to be notice of the award given to the parties; but that *ready* to be delivered must be taken to mean a delivery in writing: and he asked, if issue had been taken on the readiness of delivery, how it should have been tried? Holt agreed that he should have been of the same opinion with Powell, if the question had been new; but said, that finding so *clear* an authority, and *some* reason for that authority, he could not depart from it: so said Gould; but they all said they would be well informed of the case in the Common Pleas, and no judgment was given.[6]

Whether an arbitrator could change an order he had once made, was a question much agitated among the Roman lawyers; and it ended in this distinction, that where the sentence pronounced, from the nature of it, and the terms in which it was conceived, amounted to an absolute determination of the whole subject of dispute, he could not alter it, though he afterwards found reason to believe he had erred, because, by pro-

[6] Oates v. Bromell, 6 Mod. 160. [The award is complete when it is *ready* to be delivered within the time appointed, and prior to the actual delivery; the arbitrator is then functus officio; and if an accident happen afterwards to prevent his making a delivery, it will still be an award. 4 East, 584. Brown v. Vawser].

nouncing such a sentence, he had executed his office, and ceased to be arbitrator; but if it comprehended only some interlocutory matter, he might alter it, because his authority still continued.[7]

And where the submission comprehended different subjects of controversy, distinct and independent of one another, his power to change a sentence pronounced with respect to one of them, without having yet decided on the others, was held to depend on the form of the submission; if by that it was provided, that he should pronounce sentence on all the subjects together, then he might change his opinion given only on one, because he had not, in fact, yet decided the whole question submitted to him; but if it was provided that he should give his opinion separately, then he could

[7] *Dicere sententiam* existimamus eum, qui eâ mente quid pronunciat, ut secundum id discedere eos a tota controversia velit. Sed si de pluribus rebus sit arbitrium receptum: nisi omnes controversias finierit, non videtur dicta sententia; sed adhuc erit à prætore cogendus. Unde videndum erit, an mutare sententiam possit? et alias quidem est agitatum, si arbiter jussit *dari*, mox vetuit: utrum eo, quod jussit, an eo quod vetuit, stari debeat? et Sabinus quidem putavit, posse. Cassius sententiam Magistri sui bene excusat: et ait, Sabinum non de ea sentisse sententia quæ arbitrium finiat, sed de præparatione causæ; ut puta si jussit litigatores Calendis adesse, mox Idibus jubeat, nam mutare eum diem posse: cæterum, si condemnavit, vel absolvit, dum arbiter esse desierit, mutare sententiam non posse. Quia arbiter, etsi erraverit in sententia dicenda, corrigere eam non potest. Ff. l. 4. t. 8. s. 19, 20. [If an award be made under the hand of an umpire and *ready for delivery* pursuant to the terms of reference, of which *notice is given to the parties*, an alteration by the umpire of the sum award though made on the same day and before *delivery* of the award, is void. But the award is good for the original sum awarded, the alteration being considered as the act of a stranger. 6 *East*, 309. *Henfree v. Bromley.*]

not change it, because this was the same thing as if there had been several submissions.[8]

Something similar to this question appears in our books, though it be not stated exactly in the same form.—If two submit to the award of several, concerning all manner of debts, trespasses, demands, and disputes, provided that it be made by a certain day, and the arbitrators make their award on one day with respect to the debts, on another with respect to the trespasses, and on a third with respect to the other things; the parties are not bound to perform any part but the first, say all the justices but Moyle, and not even that, says Prisot.[9] And Rolle, in abridging the case, adopts the latter opinion.[1] But it is admitted, that the arbitrators may consult together, on one day, on one point, and make up their minds upon it, and so of another point, another day, and so of a third, on a third, provided they do not make their award of any part before the rest.[2]

Unless, however, it must be understood, that, in the former case, the parties are ordered to perform the things separately awarded, before the whole award be made, this seems to be a distinction unsupported by any essential difference; for if the arbitrators have in fact made up their minds on one point, one day, and

[8] Quid tamen si de pluribus controversiis sumptus est nihil sibi communibus, et de una sententiam dixit, de aliis nondum? nonquid desiit esse arbiter; videamus igitur an in primâ controversia, possit, mutare sententiam de quâ jam dixerat? et multum interest, de omnibus simul ut dicat sententiam, compromissum est, an non. Nam si de omnibus, poterit mutare: nondum enim dixit sententiam, quod si et separatim, quasi plura sunt compromissa: et ideo, quantum ad illam controversiam pertinet, arbiter esse desierat. Ff. l. 4. t. 8. s. 21.

[9] 39 H. 6. 12.

[1] Rol. Arb. H. 1. 2.

[2] 39 H. 6. 12. Bro. Arb. pl. 29. Rol. Arb. H. 3.

on another, another day, it is in effect the same thing as if they had reduced their opinion into the form of an award on the several points, on the several days, and the whole award must be taken to have effect only from the time when the whole award is finished. The only good reason that can be alleged against their making one part at one time, and another, at another time, is, that on hearing the whole, they may see reason to alter their opinion on some of the parts. If in fact they see such reason, they may change their award on the particular parts; and if they make no alteration, it is a proof they are satisfied with their first determination on each particular point.

*Reservation of their Authority.*

But that which bears the nearest resemblance to this question in the Roman law, is the doctrine relative to the reservation of authority. The object of every reference is the attainment of a final and certain determination of the controversies referred; a reservation of any point for the future decision of the arbitrator is inconsistent with that object: and therefore it is established as a general rule, that such a reservation is void;[3] as if the arbitrators order that one of the parties shall give security to the other for the payment of a sum of money, but reserve to themselves the power of considering the propriety of that security; or if they reserve to themselves the power of explaining any doubt that may arise on the meaning of any part of the award.[4] So, it has been resolved, though not till after many arguments,

[3] 19 E. 4. 1. Rol. Arb. H. 4. vid. Selby v. Russel, 12 Mod. 139.

[4] 2 Rol. Rep. 214, 215.

that, if they reserve to themselves the power of altering the whole, or part of the award, this is clearly void.[5]

It was awarded, that one of the parties should pay so much money to the other, and that if more should appear to be due to the latter, and due proof made of it within a month, then he should also pay that. The submission contained a proviso, that the award should be made before a certain day, which was before the end of the month. Rolle, in his abridgment of this case, says, that this seems a void award, because it is not final. But he adds a doubt, "the issue being, that the arbitrators made no award, and that found in favour of the plaintiff; that the judgment in the Common Pleas was confirmed "on the words of the submission, admitting that part to be void, because it was not averred, that there was any doubt about it before the submission." What was the judgment of the Common Pleas does not very distinctly appear by this account, nor what is meant by "admitting *that* part of the award to be void:" but it is most probably meant to be expressed, that the judgment of the Common Pleas was in favour of the plaintiff, and that that part only which related to the payment of a further sum on due proof was void, the rest of the award being valid.[6]

A submission respected the privilege of cutting down trees in certain wood, and it was awarded, as to part, that the defendant should leave so many of the trees to the plaintiff for housebote and hedgebote, as the arbitrators, on advice with counsel at the assizes,

[5] 2 Rol. Rep. 189, 214. Palmer 110, 146.

[6] Rol. Arb. H. 13.

should appoint; it was held, that this was a reservation of authority, and therefore void.[7]

But an award, "that one of the parties shall pay to the other 105*l.* on a certain day; and if he do not pay it then, that he shall pay at a future day 110*l.* is said to be good; because it is not a reservation of a future authority, but a penalty to enforce payment at the day, which is within the power of the arbitrators.[8]

A submission to an award contained a proviso, that it should be made before Michaelmas, and the arbitrators awarded, that the one should pay 5*l.* to the other for ten loads of hay, and several other sums for other things; and further awarded, that if he who was to pay should disprove the receipt of the commodities, or should give better proof of the payment of some sums of money, before the arbitrators, or one of them, before the said feast of Michaelmas; then so much as should be so proved, should not be paid at that feast.[9] In two reports, both apparently of this case, it is agreed, that this is a reservation of authority; but they do not agree in stating the effect of it on the whole award. Rolle says, that the reservation is void, "but that the former part of the award being good shall stand, because the authority of the arbitrators was determined." But Hobart says, that the court took time to advise, "whether this reservation should frustrate all reaching to the award, or whether the award should stand, and the reservation be void."

[7] Thinne v. Rigby, Cro. Jac. 315.

[8] Royston v. Ryall, 2 Jac. Rol. Arb. H. 8.

[9] Beckwith v. Warley, 16 Jac. Rol. Arb. H. 9. Warley v. Beckwith, Hob. 218.

If it be a rule in the construction of awards, that they shall be certain and definite, it would seem in this case, that the reservation rendered the whole award void, because it renders it altogether uncertain; and this is consonant to what is laid down in another book,[1] as a general distinction, "that where the arbitrator reserves a power over any thing submitted, the award is not final, and therefore it is void; but where the thing over which he reserves the power is not within the submission, the power is void, and the award, as far as that extends, void also; but in the thing submitted, the award is final and peremptory."

The following seems an example of the application of the first part of this distinction: a question, relative to certain currants, was submitted, and an award was made in these terms; that if the defendant could make it appear, before the 20th of December, that the currants were delivered to the plaintiff, then the arbitrators would make a further award within fourteen days after, if they could agree; otherwise, that J. S. as umpire, should conclude it in seven days after; that the plaintiff and defendant should stand to the award of the arbitrators, if they made one, and if they made none, to the determination of the umpire. But if the defendant, before the 20th of December, should shew no such proof, it was, in that case, awarded, that the plaintiff should not pay for the currants, but should be free from any further claim on that account; and it was further awarded, that the defendant should pay to the plaintiff 19*l.* 12*s.* before the first day of January

[1] Palmer, 110, 146.

after, if no award should be made before that time for the currants.—This award was held to be altogether void, for that the first part was void, being partly a reservation, and partly a delegation of authority; and if an award had been made, according to the power reserved or delegated, it was not intended that the defendant should pay to the plaintiff the 19*l.* 12*s.* and the latter clause depending on the first, which was void, must also be void.[2]

A distinction is also made between the reservation of a further *ministerial* act, and of a *judicial* one; the former, it is said, may be reserved, the latter cannot; all the judicial authority of the arbitrators determines with the time limited for them to make their award; but they may reserve a further *ministerial* act to be done either by themselves or by a stranger, at any subsequent point.—However well founded this distinction may be, it is not always very successfully exemplified by the cases in the books. It is said, if one of the parties assert, that he has a receipt for a certain debt claimed by the other, the arbitrator may award, "that if he produce the receipt before such a day, after the time limited for making the award, then he shall be discharged of that debt; but if he cannot produce it by that day, then he shall pay the money;" for that this is only the reservation of a ministerial act. But, with deference to the authority of the book, it is neither the reservation of a ministerial nor of a judicial act, but an award, of which the final determination depends on a future contingency, and therefore the

[2] Brown v. Dalton, M. 9 Car. B. R. Rol. Arb. H. 10.

question, whether it be good or bad, depends on another principle, which requires, that all awards should be final and certain.—On the same distinction it is endeavoured to support the authority of a case, cited from the year books,[3] but which is not to be found there. This was the case of a submission of a dispute concerning a horse; one of the parties insisted, before the arbitrator, that the horse was worth 20*l.* the other that he was only worth 10*l.* The arbitrator awarded, that if J. D. should say that the horse was worth 20*l.* then the one should pay to the other 20*l.* if 10*l.* then only 10*l.* and this, it is said, was held to be a good award, as being only the reservation of a ministerial act; had there been other subjects of dispute, and the arbitrator, in order to satisfy his own mind about the amount of damages to be given, had referred to J. D. to set a value on the horse, this might have been considered only as a ministerial act; but as the case is here stated, the only question referred to his decision appears to have been, to settle the value of the horse, and by referring to the judgment of J. D. he delegated his whole authority, which he had not power to do.[4]

Neither have the courts been always unanimous in their opinion of what should be considered as a judicial, and what as a ministerial act.—An umpire ordered that the defendant should deliver to the plaintiff certain goods particularly specified; and that the plaintiff should deliver to the defendant certain other goods also by name: but that if any of the goods, on either side

[3] 30 H. 6. tit. Arbit. Rol. Rep. 189, 214.

[4] Vid. for these two cases, 2

awarded to be delivered up, should be lost or mislaid, then the party, on whose side the deficiency should be found, should pay to the other the value of them, according to the appraisement of the umpire and the arbitrators. It was disputed, whether this should be considered as a judicial or a ministerial act. Trevor, Chief Justice, and Blencow, Justice, were of opinion, that it was the former; Powell, Justice, that it was the latter.[5] If the valuation of the horse, in the last case, could be considered as a ministerial act, surely this appraisement ought to have been so too.

A submission was of disputes concerning certain land, and it was awarded, that one of the parties should pay a certain sum of money to the other for every acre, to be measured by an able measurer in the presence of the arbitrators, at the rate of so many yards to the pole. This was held clearly to be only a ministerial act, to ascertain the quantity of the land.[6]

*Delegation of their Authority.*

The submission by the litigating parties, to the decision of an individual, arises from the confidence which they repose in his integrity and skill, and is merely personal to him; it is therefore inconsistent with the implied intention of the submission, that the arbitrators or umpire should delegate any part of their authority to another, or refer to him the decision of any point on which they find any difficulty to decide themselves. On this principle it is established as a general rule, both in the civil and the English law, that a delegation of authority is void.[7]

[5] Cockson v. Ogle, 13 W. 3. C. B. Lutw. 550.

[6] Hunter v. Bennison, Hardr. 43.

[7] Puto vere non committi, si dicat *ad judicem de hoc eundum, vel se vel alium: in se vel in alium compromittendum.* Nam

Therefore, if instead of deciding the matters submitted to him, the arbitrator direct that the parties shall stand to the award of a third person, this is void.[8] So, if he award, that the defendant shall account before such auditors as the plaintiff shall assign, and that if he be found in arrears, he shall pay the sum found, and that each shall then go quit against the other.[9] And the same rule prevails where the delegation is necessarily implied, as where it is expressed; and therefore if the arbitrators leave the matter incomplete, the defect cannot be supplied; as if they award, that one of the parties shall give a bond to the other without mentioning in what sum, the award is nugatory, because neither the plaintiff nor the defendant can determine the sum.[1]

So, where it was awarded, as to part, that the defendant, at such a time and place as the plaintiff should appoint, should make a public confession of his offence for the battery of the plaintiff: this was held to be void, because the arbitrator ought to have determined the time and place, and not to have left their appointment to another, more especially to the plaintiff, who

et Julianus impune non pareri, si jubeat *ad alium arbitrum ire*, ne finis non sit—ne propagentur arbitria, aut in allos interdum inimicos agentium transferantur, suâ sententiâ finem controversiæ imponere cum oportet: non autem finiri controversiam, cum aut differatur arbitrium aut in alium transferatur;—idque delegari non posse nisi ad hoc compromissum sit, ut arbiter statueret, cujus arbitratu satisdaretur. Ff. l. 4. t. 8. s. 32. n. 16. In compromissis arbitrium personæ insertum, personam non egreditur. S. 45.

[8] M. 8 Ed. 4. 27 Ed. 3. 20 Brooke 44. b. Jenk. 129. H. 37 El. inter Lower et Lower Rol. Arb. B. 20 H. 11.

[9] 30 H. 6. Fhbt. 52. b. Rol. Arb. I. 9.

[1] Samon's case, Cro. El. 432. 560..78.

thereby became judge in his own cause; for though in general, time and place are but circumstances, yet in such a satisfaction as this, they make the most considerable part.[2]

But where arbitrators award the substance of the thing, and leave only the form to be settled by another, or the amount of a sum to be calculated, this is not such a delegation of their authority as to vitiate the award; for the same distinction between a judicial and a ministerial act prevails with respect to the delegation as the reservation of authority.—Thus, an award, "that one shall pay 10*l.* to the other, and, for security of payment, shall be bound in an obligation, by the advice of counsel," is good, for it is incident to the award, that counsel should make the payment sure.[3] So, if it be awarded, that on payment of 10*l.* by the one, the other shall give a general release, as fully and beneficially as counsel shall advise, this is good; for it gives no power to the counsel to do a judicial act; their authority is only ministerial. The arbitrator has directed the extent of the release, by ordering it to be general, and the counsel is only to see that it be so drawn as to have that effect.[4] So, if in order to decide the title to certain land between the parties, the arbitrators award, that an action should be conceived by the advice of certain counsel; for this is not referring the matter to their judgment on the substance, but

[2] Glover v. Barrie, 10 W. 3. C. B. Lutw. 1597, 1 Salk. 71.

[3] 19 Ed. 4. 1 Rol. Arb. H. 5.

[4] Tr. 1650, Cater v. Startut on demurrer. Rol. Arb. H. 7. Style 217, 218.

on the form.[5] But a distinction in these cases seems formerly to have been made between such a reference to counsel, and to a stranger. When made to the latter, it was said to be the delegation of a judicial act, and therefore void;[6] but this seems to be a distinction without any foundation.[7]

On this point there is some uncertainty in the Roman law; some holding, that a reference to another to settle the form which should give effect to the substance of the award, was generally valid; while others held that it was void, unless it was made in consequence of a power given for that purpose in the submission.[8]

That arbitrators, where they award the substance of the thing to be done, may refer it to another to settle the manner in which it shall be put in execution, is now fully settled by a determination of Lord Hardwicke's.

By the consent of plaintiff and defendant in several causes, depending in Chancery, respecting partnership transactions, an order was made, that all matters in difference between them, relating to their joint dealings, or otherwise, should be referred to arbitration. The

[5] 8 Ed. 4. 11. a. Brooke 37.

[6] 19 Ed. 4. 1 Rol. Arb. H. 6. Emery v. Emery, Cro. El. 726.

[7] Jenk. 128.

[8] Quod si hoc modo dixerit, ut arbitrio Publii Mævii fundus traderetur, aut satisdatio detur: puto parendum esse sententiæ. Idem Pedius probat—sinem controversiæ imponere oportet; non autem finiri controversiam cum arbitrium in alium transferatur, partemque sententiæ esse, quemadmodum satisdetur, quibus fidejussoribus; idque delegari non posse, nisi ad hoc compromissum sit, ut arbiter statueret, cujus arbitratu satisdaretur. Ff. l. 4. t. 8. s. 32. n. 16.

arbitrators made an award, and the plaintiff filed a bill against the arbitrators and the defendant, to have an inspection of all the accounts from which the arbitrators had framed their award, that the award might be set aside; and that the defendant might account generally for all transactions during his partnership with the plaintiff.—The defendant pleaded the reference by consent, and that the arbitrators had, within the time limited, made their award, which he set forth, and which, among other things, contained the following orders: Having given, in a schedule to their award, an account of several debts and effects owing to the partnership, to the amount of 5094*l.* 14*s.* 2*d.* they awarded, that these debts and securities should belong in moieties to the plaintiff and defendant, and, that they might be the better collected, they recommended to the parties to consent, that an order should be made by the court, for the appointment of a proper person, conversant in mercantile affairs, to collect in the same for their joint use; and, in case either of the parties should refuse their consent, the arbitrators made it their humble request to the court to order the same, as being the most probable means of preventing future litigations between the parties.

They awarded and declared that, exclusively of the above matters, there was then due, from the plaintiff to the defendant, the sum of 9194*l.* 19*s.* 6*d.* on a fair balance, which they awarded to be paid by instalments of 2000*l.* at a time, with interest at 4*l.* per cent.

And lastly they awarded that, on payment of the 9194*l.* 19*s.* 6*d.* by the plaintiff, his executors, &c. to the defendant, his executors, &c. they, the said plaintiff, and defendant, their respective executors and admi-

nistrators, should mutually execute and deliver to each other respectively a good and sufficient release and discharge, by which the said parties should respectively release to each other all matters in difference between them, relating to their joint dealings; and that the form of the release should be previously settled by one of the masters of the court, in case the court should be pleased to give directions for that purpose.

To the first part of this award, it was objected, that the recommendation of the arbitrators to the parties to consent, that an order should be made by the court for the appointment of a proper person to collect the debts due to the partnership, was a deputation to a third person to do an act which ought to have been done by themselves, and that therefore they had not properly exercised their own judgment. To the second part it was objected, that the arbitrators ought to have settled the release themselves, and not to have left it to be done by a master under the order of the court.

With respect to the first objection, Lord Hardwicke said, he had entertained great doubts; but as the justice of the determination was the material thing, and as the award answered the purpose of parties, in submitting to a reference, if it was good to a common intent, he was now of opinion it was sufficient; for that in cases of this sort, in mercantile affairs, which could not admit of certainty, it would be too nice to defeat awards on objections of this kind. It had been said, that the recommendation to the parties by the arbitrators, to consent that an order should be made by the court for the appointment of a receiver, and in case of the parties refusal, the request to the court to make such an order, was a delegation of their power. If it were

indeed a delegation of their power, the award was void for the whole; but it had been answered, that what the arbitrators had done in this respect was, at most, but surplusage; yet his Lordship observed, if it affected the justice of the case, with respect to the things submitted, it would not be merely surplusage. But it seemed to him, that this recommendation was not compulsory on the parties, but left them at large; and if they did not approve of the scheme, it was surplusage only, and not a delegation of their power.

The true question was, whether the award, that the debts due to the partnership, when received, should be divided in moieties between the parties, was sufficient? and he was of opinion it was, for the arbitrators had no control over the debtors themselves, who might, if they pleased, pay the whole to one of the partners.

To lay it down as a general rule, he said, that arbitrators must particularly point out the method in which their award should be carried into execution, would be too nice, and such a rule would overturn a great number of awards; if, in such a case as the present, one of the parties should release a debt due to the partnership, that would be a breach of the award, and the other party could have no remedy but by action, or bill, to have the award carried into execution, and then no award could ever be effectual to finish disputes between contending parties.

In the present case, he could think of no other method the arbitrators could have pursued: it had indeed been said, that they might have directed the parties to give such person, as they should appoint, a letter of attorney to get in the debts; but this would not have been advisable, because if the person so de-

puted had proved insolvent, it would have been doubtful whether the arbitrators themselves would not have been liable.

As to the last objection, he said, the award had fully and completely described what the parties should do, with respect to giving releases, and then followed the reference to the master to settle the form. If the award had said, that the release should be settled by the court first, and then the arbitrators would consider whether they should order a release between the parties, this would have been very different, and he should have thought it a delegation of their power, and the award consequently void; but here they had awarded releases, and only left it to the court to give directions to a master to settle the form; and it would be very extraordinary, when he thought the arbitrators had done all that was necessary, and when there was no occasion for the court to interfere, yet, because they had said they left it to the court, therefore he must interpose merely for the sake of making that a bad award, which, without his interposition, would have been good.[9]

After the introduction of references at *nisi prius*, there could be no question but the arbitrator had a jurisdiction over the costs of the action, as well as over the subject of the action itself, unless it was provided by the form of the submission that the costs should abide the event, or that each party should pay his own costs; or unless there was some other restriction with respect to the costs: because unless there was some restriction, the costs accruing before the reference was

[9] Lingwood v. Eade, 2 Atk. 501. (515). [Vide Levezey et al. v. Gorgas et al. 4 Dallas's Reports, 71.]

within the submission; and in this case, if the arbitrator incorporate the costs with the damages, the court cannot interfere; neither can they interfere when they are given separately, unless they are excessive, and then only by considering their excess as an evidence of undue practice.[1]

It afterwards became a question, however, whether the arbitrator, instead of ascertaining the costs himself, could refer it to the proper officer of the court to tax the costs; and it was settled, on debate, that he might, the courts comparing awards to judgments at law, to which, though certainty be requisite, yet the officers always tax the costs; and therefore, where the arbitrator gives such directions, this does not defeat the award.[2] Where the arbitrator awards costs of suit to be taxed, without saying by whom, it must be understood that they are to be taxed by the proper officer of the court, that being the settled mode of taxing costs by the law of the land.[3] If he award simply that one of the parties shall pay costs, without specifying the sum, or saying "to be taxed," the court will supply it, by ordering them to be taxed by the proper officer.[4] But if he award costs of the suit, and of the reference, the court will order only the costs of suit to be taxed, because the officer cannot judge of the costs of the reference.[5]

[1] Shephard v. Brand, B. R. H. 54.

[2] D. per Ld. Hardwicke, 2 Atk. 519. (504). Winter v. Garlick, 1 Salk. 75. 6 Mod. 195. 2 Keb. 231. Nutt v. Long, B. R. H. 181.

[3] Barnes, 56. vid. 1 Sid. 358.

[4] Dudley v. Nettleford, Str. 737. Thomlinson v. Arriskin, Comyns, 330.

[5] Barnes, 58.

But the arbitrator cannot refer the settlement of costs to any person who is not the proper officer of the court, because the court have no control over any other person. In an action on an arbitration bond, the plaintiff, in his replication, set forth an award, "which, among other things, ordered, that the defendant should pay such a sum to the plaintiff as J. W. and J. G. should settle for costs, having regard to such costs as are usually taxed by masters in Chancery," and averred, that the said J. W. and J. G. settled the sum of so much to be due for costs, in which he had regard to such costs as are usually taxed by masters in Chancery, and assigned a breach in the non-payment of that sum. To this the defendant demurred, and the demurrer was held good; for though several cases were mentioned, in which costs were awarded, it was answered, that these were all of costs to be taxed by the proper officer of the court, or costs generally, which meant the same thing; that this was reasonable enough, because the reference to the proper officer made an end of the matter, as he was subject to the authority of the court, who, if he erred, could amend his errors summarily; but they had no control over a stranger. And it having been argued, that this taxation was a ministerial, not a judicial act, and that arbitrators might delegate a ministerial act; it was answered, that this was not merely a ministerial act, and appeared not to be so, from the terms in which the award was penned; for the referees were directed to have regard to such costs as the master would allow, which was an act of judgment: reference to an officer was merely ministerial, to a stranger judicial.[6]

[6] Nutt v. Long, B. R. H. 181. Str. 1025.

Neither can the arbitrator award a sum of money in certain, and also the costs of suit depending in an inferior court, because, says the book, there is no mode of ascertaining them; in this case, therefore, he must necessarily ascertain them himself.[7]

If, in any point, the arbitrators order that the parties shall stand to the award already made on that subject by former arbitrators, this is not such a delegation as to defeat the award; for it only expresses their approbation of what others have done, and has the same effect as if they had repeated the former award as from themselves, in so many words.[8]

So, an award, "that one before made by another arbitrator shall stand in all other respects, except, that whereas in the former award one was to pay 10*l.* at Michaelmas, he shall have till Christmas to pay it," is good; for this is the same thing as if, without referring to the former award, they had repeated it with this alteration.[9]

*At what time they may make their Award.*

When by the submission a time is limited for making the award, it seems hardly necessary that it should have been judicially decided that it might be made on the day of the submission, yet a decision to that purpose is gravely reported.[1] It has also been found necessary to declare judicially, that the arbitrators may make their award in the evening of the day preceding that before which it is limited to be made, provided they do it before midnight.[2]

[7] 6 Mod. 195. Salk. 75.
[8] 39 H. 6. 11. a. per Prisot.
[9] Semb. sed quære. Car. Rol. Arb. H. 12. Tr. 3 Jac. dubitatur.
[1] Latch. 14.
[2] Withers v. Drew, Cro. El. 676.

Where it is provided in the submission that the award shall be made *on* or *before* a particular day, and the time is afterwards enlarged by consent *until* a subsequent day, the award may be made *on* the latter.

Thus where the proviso was, "that the award should be made *on* or *before* the first day of Michaelmas term," and the time was enlarged on motion by consent "*till* the first day of Hilary term;" the award was made *on* the first day of Hilary term, and an application being made to set it aside, on the ground of its having been made out of time, the Lord Chancellor[3] said he thought it impossible to impeach it on this foundation; that this was an enlargement of the time in *statu quo*, and must, therefore, *include* the first day of Hilary term, which, it was manifestly meant, should be *substituted* instead of the first day of Michaelmas term; and being satisfied with the award on the circumstances of the case, he ordered it to stand.[4]

Where a question arises as to the extent of the matters *actually* submitted to the decision of the arbitrator, the latter may be admitted as a witness to prove what matters were or were not laid before him.[5]

[3] Thurlow.

[4] Knox v. Simmonds, 3 Brown. Ch. Rep. 358.

[5] Vid. Ravee v. Farmer, 4 Term Rep. 146.

## CHAPTER V.

### THE AWARD OR UMPIRAGE.

EVERY award in writing, in order to be enforced by law, must be on a suitable stamp; and the Court of King's Bench has lately decided, that if it be under seal it must be on a *deed* stamp, the sealing, as they held, constituting it a deed.[1] But if it should happen to be on an *improper* stamp, the court will not on that account set it aside, but leave the party in whose favour it is made at liberty to procure the proper stamp to it, by paying the penalty.[2]

It has been laid down as a general rule, that the arbitrator is a judge, from whose sentence there is no appeal, and that no other tribunal can inquire into the equity of his decision.[3] This is equally the general doctrine of the civil and the English law; but in both

[1] I do not find the case reported, nor do I recollect the name of it.

[2] Preston v. Eastwood, 7 Term Rep. 95.

[3] Arbitrorum genera sunt duo; unum ejusmodi, ut sive æquum sit sive iniquum, parere debeamus; quod observatur cum ex compromisso ad arbitratum itum est. Ff. l. 17. t. 2. s. 76, 77, ante page 73.—Qualem autem sententiam dicat arbiter, ad Prætorem non pertinere, Labeo ait dummodo dicat quod ipsi videtur. Ff. l. 4. t. 8. s. 19.

it is guarded with particular restrictions, derived from the nature of the authority conferred on the arbitrators, and the implied engagement under which the contending parties bind themselves by their submission.[4]— The chief of those restrictions is that which requires that the award should be consistent with the terms of the submission, the whole authority of the arbitrators being derived from thence.[5]

*The Award must be according to the Submission.*

The principal distinction in the Roman law is that between what is called a full and what is called an incomplete submission. A full submission was that which comprehended all kinds of controversy, and every subject of dispute between the parties; an incomplete submission extended only to some particular matter; yet, if the meaning of the parties was to confine the authority of the arbitrator to one subject, though by inadvertency the submission was full, the intention of the parties prevailed over the strict form of the submission, and they were not concluded, by a general award, from suing one another, on all those causes of action which were not intended to be submitted.[6] It

[4] Vid. ante page 4. Quæsitum est de sententia dicenda? et dictum, non *quamlibet:* licet de quibusdam variatum sit. Ff. l. 4. t. 8. s. 32. n. 16.

[5] *De officio Arbitri* tractantibus sciendum est, omnem tractatum ex ipso compromisso sumendum: nec enim aliud illi licebit, quam quod ibi, ut efficere possit, cautum est.—Non ergo quodlibet statuere arbiter poterit, nec in re qualibet; nisi de quâ re compromissum est; et quatenus compromissum est. Ff. l. 4. t. 8. s. 32. n. 15.

[6] Plenum compromissum appellatur, quod *de rebus controversiisve compositum est:* nam ad omnes controversias pertinet. Sed si forte de unâ re sit disputatio, licet pleno compromisso actum sit, tamen ex cæteris causis actiones super-

was also a rule, that though the submission was full, yet it comprehended only those disputes which existed at the time of the submission, and that the arbitrator could not decide on any thing which had subsequently arisen.[7]

The same distinction between a full and a particular submission is also recognized in the English law; but that is far from being alone sufficient to explain the great multiplicity of cases that occur: it will therefore be necessary to compare the terms of the award with that of the submission under which it is made, arranging the cases according to the particular branches of the general rule to which they immediately refer.

*Must not extend to any Matter beyond the Submission.*

The first branch of the general rule is, that the award must not extend to any matter not comprehended within the submission.

Thus, if the submission be confined to a *particular* subject of dispute, while there are other things in controversy between the parties, an award which extends to any of these other things is void, as far as it respects them.[8]

By a submission of all *actions* personal, the arbitrators have no power to make an award of any thing in which the parties have only a *cause* of action. Thus, in case

ease: id enim venit in compromissum, de quo actum est ut veniret. Sed est tutius si quis de certa re compromissum facturus sit, de ea sola exprimi re in compromisso. Ff. l. 4. t. 8. s. 21. n. 6.

[7] De his rebus et rationibus et controversiis judicare arbiter potest, quæ ab initio fuissent inter eos, qui compromiserunt, non quæ postea supervenerunt. Ff. l. 4. t. 8. s. 46.

[8] Vid. 2 Mod. 309.

of such a submission, an award "that one of the parties shall convey E, the servant of the other, to London," is void, unless it appear that an action was depending relative to this servant.[9]

But had the submission been of all actions and *complaints*, this would have comprehended *causes* of action; and the award, with respect to the conveyance of the servant, would have been within it.

If the submission be of all actions personal, suits and complaints, the word "personal" extends to suits and complaints, and consequently an award of all actions real is beyond the submission; but if it be of all actions personal, *and* suits and complaints, the word personal does not extend to the latter part, and an award on such a submission may comprehend actions real.[1]

Yet, where the submission is only of things real, the award may order a sum of money to be given in satisfaction. The submission was concerning the right and possession of a manor; it was awarded, that one of the parties should release his right in the manor to the other, and that the other should pay him twenty pounds: it was held, that though the submission was only of things real, yet the award of the twenty pounds was good.[2]

It seems also to have been the prevailing opinion in the same case, that where the submission is of things personal, yet the arbitrator might award something in the realty in satisfaction; this may perhaps be well

[9] 36 H. 6. 11 b. Bro. Arb. pl. 27, 50.

[1] 9 Ed. 4. 44. a. Fhbt. 52. a. Rol. Arb. D. 6. 7.

[2] Id. ibid.

founded, where the party to whom the thing in the realty is awarded in satisfaction is ordered to give up some personal demand, to which otherwise he appears to be intitled; for in such a case the award will amount to the order merely of a bargain and sale, but I doubt much whether it can be supported in the general terms in which it is here conceived. An award of *money* in satisfaction of any injury is good, because money is the universal standard by which damages are estimated and property valued: but it seems to be altogether unreasonable to permit an arbitrator, to order, without restriction, the transfer of any property, or the performance of any particular act, unless that article of property, or that particular act, have an immediate connection with the subject of dispute. Thus, where the submission relates merely to a trespass, or to a claim of any specific kind, it would be highly unreasonable to leave it to the caprice of an arbitrator to order one of the parties to deliver to the other a particular horse, or a particular article of dress, or to release his right in a certain piece of land, which were severally unconnected with the dispute submitted to him.[3]

There are, however, one or two cases which seem to convey an idea that, in modern times, an award of something else than money, in satisfaction of a trespass, would be considered as valid.

To an action of trespass, the defendant pleaded a submission by himself and the plaintiff to the award of J. S. who ordered that the defendant should provide a

[3] Vid. 9 Ed. 4. 44. Rol. Arb. B. 11. Dict. cont. per Moyle.

couple of fowls, at his mansion-house in Old Bedlam, to be eaten by the plaintiff and his friends, on Wednesday or Thursday in a certain week, in satisfaction of a trespass; he averred that he had, on Thursday in the week appointed, provided two fowls, but that the plaintiff and his friends had not come to eat them.—No objection was made to this award, because it ordered something to be done which had no relation to the subject of the submission; but it was objected, that being an award of a *collateral* thing, it could not be a good bar without execution; the word "collateral" being here used in contradistinction to the payment of money; and that therefore the defendant ought to have given notice to the plaintiff on which of the days, and at what hour he would provide the fowls. But the court thinking the matter of too ludicrous a nature to deserve a solemn decision gave no judgment, but recommended that it should be compromised.[4]

In another case it is said, that, by the better opinion, an award, "that the defendant should make a submission before the mayor of a town, for an injury done to the plaintiff," is good; but this was not the point directly in question; for the arbitrator had awarded, that the defendant should make this submission at any time and place, at the discretion of the plaintiff, which the court held to be clearly bad, because it made the plaintiff judge of the satisfaction to be given to himself; time and place in such a case making a principal circumstance.[5]

[4] Purslow v. Baily, 6 Mod. 221. 2 Ld. Raym. 1039. 1 Salk. 76.

[5] 1 Sid. 12.

Notwithstanding the conclusion which might be drawn from these cases, it is conceived, that an award of any thing, not connected with the subject of dispute, is not binding on the parties.

If two submit to the award of a third person, all *demands* between them, without more; the word "demand" implies all matters between them, concerning the lands of both parties, which are the subject of variance.[6]

If the submission be, "of all causes of action, suits, debts, reckonings, accounts, sums of money, claims, and demands;" an award "to release all bonds, specialties, judgments, executions, and extents," is within the submission; for as all debts are submitted, the arbitrators have power to make their award concerning the debts themselves, and of course to award a release of every thing by which they are secured.[7]

Where the submission is "of all debts, trespasses, and injuries," an award "to release all actions, debts, duties, and demands," does not exceed the submission; for the word "injuries" is sufficiently comprehensive to imply all "demands."[8]

If the submission be, "of the right and title of a manor, and other lands and tenements, and of all manner of actions and demands," an award, "that one of the parties shall deliver to the other a deed of annuity, by which forty shillings a year were granted to the wife of the former, to be taken out of the manor,"

[6] Keilway 99. vid. 1 Ld. Raym. 115 acc.

[7] Roberts v. Marriot, 2 Saund. 190.

[8] 3 Bulstr. 312.

Where it is provided in the submission that the award shall be made *on* or *before* a particular day, and the time is afterwards enlarged by consent *until* a subsequent day, the award may be made *on* the latter.

Thus where the proviso was, "that the award should be made *on* or *before* the first day of Michaelmas term," and the time was enlarged on motion by consent "*till* the first day of Hilary term;" the award was made *on* the first day of Hilary term, and an application being made to set it aside, on the ground of its having been made out of time, the Lord Chancellor[3] said he thought it impossible to impeach it on this foundation; that this was an enlargement of the time in *statu quo*, and must, therefore, *include* the first day of Hilary term, which, it was manifestly meant, should be *substituted* instead of the first day of Michaelmas term; and being satisfied with the award on the circumstances of the case, he ordered it to stand.[4]

Where a question arises as to the extent of the matters *actually* submitted to the decision of the arbitrator, the latter may be admitted as a witness to prove what matters were or were not laid before him.[5]

[3] Thurlow.

[4] Knox v. Simmonds, 3 Brown. Ch. Rep. 358.

[5] Vid. Ravee v. Farmer, 4 Term Rep. 146.

## CHAPTER V.

### THE AWARD OR UMPIRAGE.

EVERY award in writing, in order to be enforced by law, must be on a suitable stamp; and the Court of King's Bench has lately decided, that if it be under seal it must be on a *deed* stamp, the sealing, as they held, constituting it a deed.[1] But if it should happen to be on an *improper* stamp, the court will not on that account set it aside, but leave the party in whose favour it is made at liberty to procure the proper stamp to it, by paying the penalty.[2]

It has been laid down as a general rule, that the arbitrator is a judge, from whose sentence there is no appeal, and that no other tribunal can inquire into the equity of his decision.[3] This is equally the general doctrine of the civil and the English law; but in both

[1] I do not find the case reported, nor do I recollect the name of it.

[2] Preston v. Eastwood, 7 Term Rep. 95.

[3] Arbitrorum genera sunt duo; unum ejusmodi, ut sive æquum sit sive iniquum, parere debeamus; quod observatur cum ex compromisso ad arbitratum itum est. Ff. l. 17. t. 2. s. 76, 77, ante page 73.—Qualem autem sententiam dicat arbiter, ad Prætorem non pertinere, Labeo ait dummodo dicat quod ipsi videtur. Ff. l. 4. t. 8. s. 19.

the award; this was held to be beyond the submission, because the rent might be extinguished by surrender, eviction, or otherwise, before Michaelmas.[6] The same thing was held at a much later period, where the award, made on the 23d of June, ordered so much rent to be paid, which, by the award itself, appeared not to be due till the 24th of June.[7]

A and B submitted to the award of J. S. a suit depending between them *in ejectione firmæ*. J. S. on that submission, made an award relative to the land for which the action was brought; in an action on the case for not performing this award, after a verdict for the plaintiff, it was adjudged, in arrest of judgment, that the award was beyond the submission.[8]

There was a dispute between a parson and one of his parishioners, whether the tythes should be paid in kind or not; and they, reciting the subject of the dispute, submitted to the award of J. S. concerning all matters, as well spiritual as temporal, from the beginning of the world to the day of the date of the submission. The arbitrator awarded, that the parson should have 7*l.* for the tythes due before the submission, and that the parishioner should pay 4*l.* annually for the tythes which should afterwards become due. This was held to be a good award for the future tythes; because the submission comprehended not only a dispute concerning the tythes then due, but a question concerning a future right.[9]

[6] Inter Gray et Wicker, Rol. Arb. B. 3.

[7] Barnardiston v. Foulyer, 10 Mod. 204.

[8] Taylor v. Waltam, P. 10. Car. B. R.

[9] Beckingham v. Hunter, H. 42 El. B. R. Rol. Arb. D. 8.

If two partners refer all matters in difference between them, the arbitrator may dissolve the partnership. At a trial at *nisi prius* a juror was withdrawn, and all matters in difference between the plaintiff and defendant, who were partners, were referred in the common form; and after the rule of reference was drawn up, the plaintiff openly declared, he would not have it understood that the arbitrator should have a power to dissolve the partnership. The arbitrator did order the partnership to be dissolved. The plaintiff applied to the court to have the award set aside on this account, alleging, that the arbitrator had exceeded his authority. The court held that, under such a general reference, the arbitrator had clearly a right to dissolve the partnership; and added, that if a difference between a master and his apprentice was referred, the arbitrator had a power to order the indentures to be delivered up. With respect to the plaintiff's declaration, that he would not have it understood that the partnership should be dissolved, Lord Mansfield observed, this was evidence out of his own mouth, that the dissolution of partnership was then a matter of dispute.[1]

Where the submission is by reference at *nisi prius*, the order in which the words are placed in the rule of reference gives rise to a material distinction with respect to the power of the arbitrator—If the reference be "of all matters in dispute in the cause between the parties," the power of the arbitrator is confined solely to the matters in dispute in that suit.—If it be "of all

[1] Green v. Waring, 1 Bl. Rep. 475.

matters in difference between the parties in the suit," his power is not confined to the subject of that particular cause, but extends to every matter in dispute between them, though there be cross demands, and though the defendant has not pleaded his demand against the plaintiff, by way of set-off; and a proviso, that the costs shall abide the event, makes no difference.[2]

An award "that both shall pay the reckoning contracted at the house where the award was made, is said to be void, because it extends to a time beyond the submission;[3] such an award indeed seems perfectly nugatory, because the landlord of the house may recover against them for the reckoning: but instead of being considered as void, because it extends beyond the submission, it would be more correct to consider it as an award, that, to a certain extent, the expences of the arbitration should be equally defrayed by the parties.

On the same principle, "of being beyond the submission," an objection has been made to an award, "that land, the subject of dispute, should be measured at the expence of both parties;"[4] though, instead of an award relative to some subject not within the submission, it is rather to be considered as an order for the performance of a future act, which is clearly within the power of the arbitrator.

It appears too, that though the arbitrator order a claim of one party against the other, which has accrued since the submission and before the award, to be given

[2] Vid. 2 Bl. Rep. 1118. 2 Term Rep. 644, 5. 3 Term Rep. 626.

[3] Hall v. Massey, Rol. Arb. K. 14.

[4] Hardres 45.

up in satisfaction of the balance of claims submitted to him; this should not be considered as an usurpation of a jurisdiction over something not within his authority, but as an award to do a specific future act, for the conclusion of the differences between them. This seems to have been the principle which prevailed in a case, where two submitted to the award of J. S. concerning all matters between them, *till* the submission, and each assumed to the other to perform the award. J. S. reciting that one of them was bound to the other in an obligation made *since* the submission, and *before* the award, ordered the obligee to deliver up the obligation to the other, in full satisfaction of all matters between them: this was adjudged a good award.[5] Rolle, however, doubts of the propriety of this decision, observing, that though this was in satisfaction of all matters *within* the submission, yet the obligation being itself *out* of the submission, and a thing in action between the parties, it would seem that it is void.

An opinion long prevailed, that under a submission in the common form an arbitrator had no power with respect to the costs of the arbitration, because they were something which had arisen since the time of the submission.[6] The only way, therefore, by which he could secure any recompence for his trouble, was to keep the award in his own hands till he was paid for it. This, however, might be subject to this incon-

[5] Nicklas v. Thomas, adjudged good. T. 15 Jac. B. R. Rol. Arb. B. 10. Reporter, quære ceo.

[6] Vid. Bushfield v. Bushfield, Cro. Jac. 577, 578. Capel v. Allen, Hil. 22 Car. B. R. Al. 10. Rol. Arb. H. 13. Berry v. Perry, Bridgeman, 90, 91.

venience, that if the parties would not pay for it, and there was a proviso, that it should be delivered within a certain time, an objection might be made to the performance for want of delivery according to that proviso: it became, therefore, a matter of prudence in those, who might be proposed as arbitrators, to refuse the office, unless a clause were inserted in the submission, that the costs of the reference should be according to their discretion. The judges, however, did once go the length of saying, that where it was part of the condition in the submission that the award should be in writing, payment for the writings was intended.[7] And it is now determined, that the power of awarding costs of the arbitration is necessarily incident to the authority conferred on the arbitrator of determining the cause; and that the reason why, in references of this sort, a provision is frequently inserted, that the costs shall abide the event of the award, is, that the arbitrator may not have it in his power to withhold costs from the party who is in the right; and that therefore such a provision is to be considered as the restriction of a power which the arbitrator would otherwise necessarily have.[8]

[7] Pinkney v. Bullock, 2 Keb. 832. vid. 10 Mod. 201.

[8] 2 Term Rep. 645.

N. B. In an opinion which I have lately seen from a very respectable authority, it is still insisted, "that the arbitrator has no power over the costs of the *arbitration*;" and it is suggested "that the rule here laid down is not warranted by the case cited in support of it:" "because," says that authority, "the reference in that case having been by *rule* of *court*, the costs in question must have been the costs of the *action*, not the costs of the *arbitration*:"—It is true the report

When a cause is referred at *nisi prius*, and it is inserted in the order, that the costs shall abide the *event*, which is the usual form, the *event* is taken to mean the *legal event*, and therefore the party in whose favour the award is made will not be entitled to any more costs than he would have been had the trial gone on, and he had had a verdict in his favour.

A cause, in which the plaintiffs were executors, was referred at *nisi prius*, with the usual proviso with respect to the costs abiding the event. The arbitrator awarded, that there was nothing due from the defendant to the plaintiffs; in consequence of which the master taxed the defendant his costs. An application being made to restrain the defendant from proceeding to enforce the payment of these, on the ground that the plaintiffs were executors, and therefore not liable to pay costs, the court held the meaning of the rule to be that which

(2 T. R. 645.) states the award to have been made in a *cause* referred to arbitration by *rule* of *court*; and it is not distinctly stated, whether the costs, to the award of which the objection was made, were the costs in the cause, or the costs of the arbitration; the reasons, however, for supposing them to have been the *latter*, are strong: In the first place, the power of the arbitrator over the *former*, when there is no *express* restriction, has been long undisputed. Vid. ante p. 134 et seq. and in the next place, the authority (1 Rol. Abr. 254.) cited in support of the objection to the power of the arbitrator over the costs, refers to the costs of the *arbitration only*, and could refer to no other, as there is not a case, to be found in the books, of a reference by rule of nisi prius, till some time after the date of that authority:—In fact, I was present in court when the case in 2 T. R. 645. was agitated, and from my own recollection, I can take upon myself to say, the costs of the *reference* only, were in question.

is stated above; and that, as it was clear, that if a verdict had been given against the plaintiffs, or they had been nonsuited at the trial, they would not have been liable to pay costs, they were consequently not liable to this order.[9]

On a similar reference the arbitrators found, that the plaintiff's original demand was under 40*s.* awarding that the defendant should pay the plaintiff only 37*s.*—An application being made to the court to have it referred to the master to tax the defendant his costs of the action, it was contended on his behalf that the plaintiff was not intitled to costs any more than he would have been if, on a trial, he had recovered under 40*s.* but that on a suggestion to be entered, by leave of the court, the defendant would be intitled to costs.—The court were of this opinion, and made the rule absolute.[1] (*h*)

The plaintiff brought an action of trespass against the defendants, for pulling down the plaintiff's gates and assaulting him. The defendants justified to all the counts, except one, under different rights of way, and pleaded not guilty to the whole: the cause was referred at *nisi prius*, the rule of reference restricting the costs of the action to abide the *event*: The arbitrator awarded a right of way to the defendants different from any of those under which they justified, and gave 5*s.* damages to the plaintiff for the assault, as having

[9] Highnam et al. v. Hassel, H. 14 G. 3. cited 3 Term Rep. 139.

[1] Butler v. Grubb, H. 23 G. 3. cited 3 Term Rep. 139. This must have been a case where the demand arose within the jurisdiction of a court of conscience.

(*h*) An act of assembly of Pennsylvania, which passed the 25th September, 1786, giving the Supreme Court original jurisdiction in the county of Philadelphia, contains a provision that "if any plaintiff shall bring or commence "any suit or action in the said court, and shall not recover thereupon more "than £ 50, such plaintiff shall not be allowed any costs of suit." A cause was

been committed when the defendants were attempting to exercise a right of way negatived by the arbitrator. It was held, on the authority of the two preceding cases, that the plaintiff could recover no more costs than damages; and further, that the arbitrator's award was not equivalent to a judge's certificate under the 22d and 23d Car. 2. c. 9.[3]

As it is the professed purpose of parties submitting their disputes to arbitration to have them finally settled, so there is no method more effectual to answer that purpose than the award of mutual releases, after the execution of other parts of the award; there are, accordingly, very few of the cases reported in the ancient books which do not, among other things, include a release: but as the arbitrator could not always be aware of every nice objection to his award, it is very seldom that the period to which the release shall extend is confined to the date of the submission. It is sometimes ordered to the date of the award, sometimes to a period long subsequent, and posterior to the time appointed for the execution of all the other parts, and sometimes generally without any limitation of the time to which it is to operate. In all these cases it has been constantly objected, that, by awarding such a release, the arbitrator has exceeded his authority: the objection has as constantly been sustained, so far as to determine the award of the release to be void for any thing arising subsequently to the submission. But many cases have gone further, and the award has been frequently considered as altogether void, on account of so trivial an

[3] Swinglehurst v. Altham et al. 3 Term Rep. 138.

was referred under rule of court, and the referees awarded to the plaintiff £36 15 0 *and costs*. An objection was taken to the taxation of costs of suit by the prothonotary, as the sum awarded was under £ 50. But the court over-ruled the objection. *Scott* v. *M'Laughlin*, in Supreme court, Sept. 15, 1803.

inadvertency in the award of the release. The history of these cases is confused and complicated, and involves a part of the subject, which will make a distinct article very considerable in itself.[3]

The next branch of the general rule is, that the award must not extend to any one who is a stranger to the submission.

Thus it has been held, that where the submission is between two, and it is ordered by the award that one of them shall convey certain land to the other and his wife, this is void as to the wife, because she is a stranger to the submission.[4]

So, if it be awarded that a third person be ready to seal and deliver 15 bonds for the payment of a certain sum to one of the parties, and that he shall do his endeavour that no advantage be taken of a forfeiture committed by that party, all this is void.[5]

So, if two submit to the arbitration of certain persons concerning the title of certain lands, and the arbitrators award, that all controversies touching the land shall cease, and that one of the parties, his wife and son his heir apparent, by his procurement, shall make to the other such assurance of the land as the other shall require, this is void; because the wife and son are strangers to the submission.[6]

So, it is said, that if the condition of a submission bond be to stand to the award of A and B, who award

[3] Vid. post, "Where an award shall be good in part though void in part," and, "how awards shall be construed."

[4] Samon's case, 5 Co. 77. b. 78. a. Rol. Arb. B. 7.

[5] 10 Co. 131. a. b. Rol. Arb. B. 5. vid. 3 Leon. 62. Mo. 359. pl. 489.

[6] Rol. Arb. N. 9.

1803. There was in fact, no provision in the rule that the costs were to abide the *event* of the suit, and of course the general power of the arbitrators over costs was unrestricted. Scott & McLaughlin is not law vide & Binn 5.

that one of the parties shall pay 20*s.* to a third person: this, says Coke, is a void award, and the bond of no force, notwithstanding an opinion to the contrary, which he says is ill reported.[7]

So, where it appeared that the plaintiff, in the action then before the court, had formerly brought another action in the King's Bench against the present defendant and one J. P. and that the plaintiff and this J. P. had submitted all manner of trespass and actions between them two, and all other trespasses between the plaintiff and the present defendant; and the arbitrators awarded, that as well for the trespass done by the defendant as by J. P. there should be paid to the plaintiff 100*s.* which J. P. had paid. This was held to be a void award, because the defendant was not a party to the submission.

Where the submission was between three on one side, and one on the other, of all actions and demands between them, it was said by three justices in the Exchequer Chamber, that the arbitrators had an authority to make an award of all joint matters between the three and the one, and also of all matters severally between the one and any one of the three; and that therefore if he awarded that any one of the three should pay so much to the single party on the other side, and that the other two should go quit; or that the single party should pay so much to any one of the other three, the award in these several cases was good.[8] And Brooke, in abridging the case, says this is good

[7] 10 Co. 131. b. Rol. Arb. B. 6. E. 5. vid. 22 H. 6. 46. b. and Brooke says *quod mirum*, speaking of the opinion to the contrary.

[8] 2 R. 3. 18.

law; but he denies that what follows is good law, viz. that the arbitrator has an authority to decide on any matter between any two of the other three.[9]

It is in general laid down, that the award of payment of money to a stranger is void:[1] but this must be understood to hold only when such payment can be of no benefit to the other party; for an award that one of the parties shall pay so much to a creditor of the other in discharge of a debt due by the other to that creditor, is unquestionably good.[2]

So, an award to pay money to W. the plaintiff's solicitor, if it appear from the nature of the case that the payment is for the plaintiff's benefit.[3]

So, where it was awarded that the defendant should pay a sum of money for the plaintiff's benefit, to such person as the plaintiff should appoint to receive it, it was said in argument, and assented to by the court, that it would hardly be contended that such an award was not good.[4]

So, if at my request, and that of W. N. two others are bound in 20*l.* and, on a dispute arising between W. N. and me, on this question, among other matters, "which of us shall pay the 20*l.*" we submit all matters in controversy, and the arbitrator award that I shall pay to the obligee the half, with interest, and W. N. the other half; this is a good award, though the payment of the money be awarded to a person who is a

[9] Br. Arb. pl. 44.

[1] Godbolt. 12, 13.

[2] R. acc. 1 Lord Raym. 123. Dodderidge semb. P. 16 Jac. B. R. Buckhurst and Mayo's case. Rol. Arb. E. 5.

[3] 1 Lord Raym. 123. M. 8. W. 3. Bedam v. Clerkson.

[4] Dale v. Mottram, 2 Bannard. 291. 6 G. 2.

stranger to the submission, because it appears to be an advantage to both parties.[5] (*i*)

If the award be, that the one shall acquit the other of a bond, in which they are both bound to a third person for the payment of a sum of money, this is good; for though he cannot compel the third person, who is a stranger, to deliver up the bond, or to make a release by the common law, yet, if the bond be not forfeited, he may pay the principal sum to the obligee at the day, and this will acquit the other. If the bond be forfeited, yet he may pay the penalty, which will also acquit the other; or, on satisfaction given, he may compel the obligee to deliver up the bond in a court of equity, or to give a release.[6] So now, since the statute for the amendment of the law, on an action brought for the penalty after forfeiture, he may pay the principal, interest, and costs, which will also acquit the other party.

It having been awarded, that the plaintiff and defendant, who were brothers, should pay a certain sum yearly for the use of their mother; this was held a good award by Powell J. because he thought it must be presumed to be for their benefit, or rather because it really appeared to be so, as it was for the use of their mother; and by Holt C. J. because he was of opinion, that a general award of the payment of money to a stranger was good, because it was to be presumed that the parties submitting were bound as trustees, or were by some means liable, and that the payment should be intended for their benefit, unless the contrary appeared.[7]

[5] Gray v. Gray, P. 16 Jac. B. R. Rol. Arb. E. 6. F. 8.

[6] Barsey v. Clipsham, Rol. Arb. E. 11. S. C. Cro. Car. 541. vid. Becket v. Taylor, 1 Mod. 9. S. P. 2 Keb. 546. S. C.

[7] Bird v. Bird, 1 Salk. 74.

(*i*) The condition of a bond was to submit to the award of five persons concerning "the exchange of a number of loan office certificates,

tificates, and of, upon and concerning an action of slander now depending between the said parties," and also of all other matters, differences and demands, &c. An award was made, whereby, among other things, the arbitrators ordered, that "in consideration of the loss sustained by the exchange of certificates between *J. G. deceased*, and Joseph Grier, (one of the parties), the said Joseph Grier pay to the *Executors* of the said J. G. deceased, the sum of 175*l.*" An action was brought upon the bond against Joseph Grier; and upon the plea of "no award," the above award was set forth in the replication; (with an averment that the plaintiffs, the other party to the submission, were the executors of J. G. deceased.) The defendant demurred; and the exception taken was, that the award ordered money to be paid to the executors of J. G. who were *strangers*, and that it could not be helped by averment. But the award was held to be good, *independent of the averment*, for the following reasons. By the condition of the bond it appeared that a particular controversy between the parties, was about "the exchange of a number of loan office certificates," and by the award the defendant, was ordered to pay the executors of J. G. deceased, 175*l.* in consideration of the loss sustained by the exchange of certificates between a certain J. G. deceased and him. From this it might be collected, that the loss *affected the plaintiffs* in some way or other, because it was made an express article in the submission, and that the payment of the money to the executors of J. G. should determine the controversy on this account. Who the executors of J. G. are, may be as easily ascertained as the costs of an action, or the charges of a voyage. So that the award was certain enough; and if the executors were to be considered as *strangers*, yet by the better authorities, an award to pay money to them shall be intended for the benefit of the plaintiffs, and that they being the submittants were either the executors or authorized by them, *unless the contrary appears*. As the executors of J. G. were persons certain it might also be averred who they are by name, were such an averment necessary, for it was only explaining more particularly what was contained in the award itself. *Grier & al.* v. *Grier*, 1 *Dall.* 173.

And, in general, a distinction is taken between the case of an act awarded to be done by a stranger, and that of an act awarded to be done to the stranger, by a party to the submission: in the latter case the award is said to be good; and if the stranger will not accept the money awarded to be paid to him, the party's obligation is saved.[8]

If the persons comprehended in the award were in contemplation of the submission, though they were not directly parties to it, yet the award is good; as if it be awarded that all suits shall cease between the parties, or any others in their behalf.[9] So, if the submission be by two, concerning a matter which arose between one of them and the wife of the other when she was sole, an award "that the other shall pay to the married man and his wife 10*l.*" is good, because it was on her account that the dispute arose.[1]

A dispute arising between A and B on one side, and C, D, and E on the other; C, in consideration of sixpence given to him by A and B, submitted the matter for himself and D and E, and assumed to stand to the award: A and B submitted for themselves on the other side. The arbitrator awarded that C, on behalf of himself and the other two, should pay a certain sum to A and B in satisfaction of the controversy: this was held to be a good award, and C adjudged to perform it, though it concerned two strangers to the submission.[2]

[8] Norwich v. Norwich, 3 Leon. 62.

[9] Onyons v. Cheese, 10 W. 3. Lutw. 530.

[1] March, 78.

[2] Bullock v. Dalbie and Gatwood, adjudged H. 14 Jac. and on a writ of error judgment affirmed. Rol. Arb. B. 18. vid. 22 E. 4. 25. 1 Barnardiston. B. R. 85. 1 Keb. 790, 865.

A bond was given by the defendant Clemence to Lynch and Templeman, of which the condition was, that Clemence, the obligor, should perform the award of arbitrators indifferently named, as well on the part and behalf of Clemence as of Lynch, without naming Templeman, "to arbitrate and determine all matters in controversy between the said parties *or either of them.*" The award, "reciting that there were several differences between the plaintiffs Lynch and Templeman on the one part, and the defendant Clemence on the other, and that they had all submitted by several bonds; reciting also, that the defendant was bound to Elizabeth Templeman, now the wife of the plaintiff Lynch: that the bond was in trust for the plaintiff Templeman, and that 117*l.* was due on that bond," ordered that the defendant should pay to the plaintiff Templeman 83*l.* in part satisfaction of the 117*l.* and for satisfaction of the residue should assign to the same Templeman a certain debt of 34*l.* due to Clemence by one Henry Beesley of London, and should execute and deliver to the same Templeman sufficient authority to sue for and recover the said debt, with covenants to be inserted in that authority; that he should not revoke it, nor receive the money from Beesley, but that he should aid and assist Templeman to recover it; that he should also make an affidavit in writing before a master in Chancery, that the sum of 34*l.* before mentioned, was really and justly due to him from Beesley; and that in case Clemence should fail to execute such authority, and take such oath, he should, within the space of two months from the date of the award, pay to Templeman the further sum of 34*l.* And that the plaintiff Tem-

pleman, on performance, should deliver to the defendant the bond in which he was bound to Elizabeth Templeman, and that the plaintiff Lynch should execute a general release to the defendant.

The objection on which the defendant principally rested his defence was, that Templeman not having been named in the condition of the submission bond, he was a stranger to the submission, and that therefore the award of payment to him was void; but it was answered, that he was so far from being a mere stranger, that he was in fact the person principally in contemplation of the submission; he was party to the bond, and the submission was of a thing, in which his interest was concerned. The wife of Lynch, before her marriage, was trustee for Templeman, and by the marriage the husband became the trustee; when, therefore, Templeman joined with Lynch in taking the submission bond, it was manifest he had agreed that the matters in controversy relative to the bond, taken by him in the name of Elizabeth Templeman, should be determined by the arbitrators, which amounted to a submission to their award. The arbitrators had, by their award, affirmed, that Templeman, as well as Lynch and Clemence, had submitted to them; the court would presume that it was so, and the parties to the submission bond were estopped to say the contrary: it was not absolutely necessary that the submission should appear by express words in the condition of the bond on which the suit was founded; it might appear by the bond made by Templeman to the defendant, for the performance of the award: but in the present case, without having recourse to extrinsic circumstances, the condition

itself implied that Templeman was a party to it, and the omission of his name was evidently the mistake of the person who drew the condition, for it was to arbitrate *between the said parties, or either of them,* where the latter words, "or either of them," would be absurd and insignificant, if there were not two persons on one side. As to the award itself, that was good, for these reasons: the money payable on the bond to Elizabeth Templeman, in equity, belonged to Templeman the plaintiff, and, by the consent of his trustee, it was to be paid to him, which was in effect the same thing as if it had been awarded to be paid to Lynch; for had it been so, it must at last have been paid by Lynch to Templeman. Tender to Templeman, and refusal by him of the money awarded, would have been a good plea to an action of debt on the bond given to Elizabeth Templeman. By the payment to the plaintiff Templeman, the defendant's bond would be discharged as well as if the money had been paid to Lynch, and Lynch would also be discharged of his trust, which was for his benefit; so that each of the parties would have a suitable benefit by this award.[3]

The condition of a submission bond recited, that a replevin was depending between Baily, one of the parties to the submission, and one Webb, who made conusance, as bailiff to Isaac Shelf, the other party, and Margaret his wife, and then stated, that the plaintiff Shelf, and the defendant Baily, were to stand to the award of arbitrators, on proviso, that the award

[3] Lynch v. Clemence, 11 W. 3. Lutw. 571.

were made concerning the premises, by a certain day. The award recited that Baily had brought a replevin, for taking his cattle, against Webb, to which Webb had made conusance, as bailiff to Shelf and Margaret his wife, and, after stating the proceedings in that action, awarded, "of and upon the premises, and of all matters in difference between the parties;" that all proceedings in the replevin should cease; that Baily should pay 7*l.* 10*s.* for the rent in arrear to Shelf, and 10*l.* costs; and that Shelf should give him a general release. In avoidance of this award, it was argued, that Webb was a stranger to the submission, and that by it the action between Baily and him was to cease; that so much was to be paid to Shelf, who was to give a release, which would not discharge Baily from the claim of Webb, who was intitled to costs, if the plaintiff in replevin did not proceed: it was answered, that *Shelf* was the party concerned in interest, and that a person might submit to an award for another.—And the court expressed the inclination of their opinion to be, that if one submitted on the behalf of another, his bond was forfeited if the stranger did not perform his part of the award; but that it did not appear here that Shelf undertook for Webb, or submitted on his behalf.[4] However, as in this case, Shelf was the principal in the avowry, and Webb only an agent, the award appears to be conclusive against Webb, and might have been set up as a defence to any claim of costs by him against Baily.

[4] Shelf v. Baily, in C. B. 8 Ann. Comyns Rep. 183.

It has been seen, that a man is bound by an award to which he submits for another;[5] and that if an attorney, without the express authority of the principal, enter into a bond to a third person, under a condition to be void on performance of the award by the principal, otherwise to be in full force; this shall bind the attorney and not the principal.[6] It has also been said, that if a man authorize another on his behalf to refer a dispute between the principal and another, an award made in consequence of such a submission is binding on the principal alone.[7] But, by a modern case,[8] it appears, that the latter assertion is true only when the agent does not bind himself for the performance of the principal; or if he does, not only the principal who authorized him but the agent himself is bound by the award.

The bond was given by one George Fitzgerald, the defendant, who was authorized by John Fitzgerald to submit all matters between the latter and Cayhill, the plaintiff. The condition reciting, that there were differences between John Fitzgerald and the plaintiff, concerning a certain debt, due from him to the plaintiff, on a bond for 800*l.* purported to be that, if the said George Fitzgerald, the obligor, for and on the behalf of the said John Fitzgerald, should perform such award as arbitrators should make, on or before a certain day, between the plaintiff and John Fitzgerald, then the bond should be void. The arbitrators awarded, that George

[5] Ante, page 42.
[6] Ante, page 45.
[7] Page 42.
[8] Cayhill v. Fitzgerald, B. R. 17 G. 2. 1743. 1 Wils. 28, 58.

F. the defendant, should pay 298*l.* 9*s.* 6*d.* that the plaintiff should receive it in full of all demands, and that they should execute releases.

Among other objections to the award, this was taken, that it was not made between the parties to the submission; for that, instead of ordering G. F. the defendant, to pay, it ought to have ordered J. F. who was the real party to the submission. The court seemed at first to think the award was bad, but afterwards Lee, C. J. delivered the opinion of the court in favour of the award: at first he said, that on reading Carthew's report of the case of Bacon and Dubarry,[9] he had been inclined to think the award was bad; but that having looked into Lord Raymond's report of the same case, and also seen a manuscript report of it, he was now clearly of opinion that the award was good, and that the present case was not to be distinguished from that; for that it appeared by the pleadings in that case,[1] that had the award been general as in the present, and not "to the use of either of them," which confined it to the attorney, it would have been good to bind the principal. In the present, it appeared on the record, that the award was made "of and concerning the premises," in the condition of the bond, for it was expressly averred to be so in the replication.

Where the stranger is only an instrument to the performance of the award, no objection shall be allowed on that account: as if it be, that one of the parties shall surrender his copyhold into the hands of two tenants

[9] Ante page 45. [1] In 2 Salk.

of the manor, who shall present the surrender; this is good, though it be awarded, that the surrender shall be made to strangers, who cannot be compelled to accept, because they are only to be used as instruments.[2]

For the same reason it is a good award, that one of the parties shall make a deed of feoffment, with a letter of attorney to J. S. to make livery.[3] Or that the defendant shall pay as the plaintiff and his attorney by a bill and oath shall make appear, for the attorney is only an instrument to ascertain the sum.[4]

As an award of a thing, out of the submission, cannot be enforced by an action at law, so neither shall a man by such an award be precluded from claiming his right in equity. This appears clearly from the case of Warren and Warren, plaintiffs, and Green, Hurtnall and others, defendants. Mary Warren, the mother of the defendants, being possessed of the residue of a term for 99 years, in certain houses and grounds in Bristol, settled them on Hurtnall, one of the defendants, and others, in trust for herself, and afterwards to the use of the plaintiff John Warren, her son: she afterwards intermarried with the defendant Thomas Green, and then Hurtnall, contrary to his trust, delivered up the settlement, and the original lease, to Green; Mary was likewise seised in fee of a moiety of other lands, and died so seised; and after her death, Green continued in possession of the lands and houses; some differences aris-

[2] Coote v. Pooley, Rol. Arb. E. 7.

[3] Rol. Arb. E. 8.

[4] Rous v. Lun, 1 Keb. 569.

ing between him and John, one of the plaintiffs, concerning the sum of 8*l.* and other trifling matters, they were submitted to the arbitration of Hurtnall, both parties entering into bonds for that purpose: Hurtnall awarded, that all suits between them should cease, and that before the end of Trinity term following Warren should sufficiently convey and assure to Green, his heirs, and assigns, all his right and title to the moiety of the said lands, and should procure his wife to join with him in a fine before the end of the said term, in order to perfect the conveyance; and should sufficiently grant, convey, surrender, and assign to Green, all his right to the houses in Bristol; and that, till such conveyance made, Green should continue in possession, and should pay to Warren some small sums, amounting to 200*l.* whereas the premises were worth more than 1000*l.* and that they should seal mutual releases to one another.

The plaintiff Warren exhibited his bill to have a reconveyance of the premises in Bristol, and an account of the profits since the death of his mother, and to have the award set aside, as comprehending subjects not within the submission.

The court decreed, that Hurtnall and the other defendants, the trustees, should re-convey the premises; that Green should account for the profits, and that the bonds of submission should be brought before the master and cancelled.[5]

[5] John and Richard Warren v. Green, Hurtnall, et al. Ca. Temp. Finch 141. This *seems* to be the essence of the decree, for the report is not accurate.

Neither shall an award affect the rights of persons not parties to the submission. Thomas Brown, on the day before his marriage with Mary his intended wife, entered into a bond to trustees for Mary, in the penalty of 10,000*l.* conditioned, that if Mary should survive him, he would leave her 6000*l.* to be paid at three payments within 18 months after his death; but that if he should purchase lands to a certain value, and assign the same, together with some other property, to her, then the bond should be void. After the marriage, the trustees delivered the bond to Mary, who locked it up in her cabinet; but the husband, or some one by his order, opened the cabinet, and took away the bond and cancelled it; and he never performed the condition with respect to the purchase of the land. Brown had several suits with the trustees, which were referred to arbitration; general releases were awarded between Brown and the trustees, but the bond was not concerned in the disputes, nor was any recompence made or intended to be made to the wife by the award in satisfaction of the bond.

A bill being filed by the widow against the executors of Brown, and these, with other circumstances, appearing in the cause, the court considering the award, and the releases given in consequence of it, to have no relation to the bond, decreed, that the widow should have the same satisfaction, and the same benefit out of her husband's estate, as if the bond had not been cancelled, and the award had never existed.[6]

[6] Mary Brown, widow, v. Will. Savage et al. executors of her husband, Ca. Temp. Finch 184. et vid. Id. 180, 441.

The adherence to the rule, "that the award should not go beyond the submission," has not been so literally strict, as to overturn the award merely because the words might seem too comprehensive; but if it might reasonably be presumed that nothing was in reality awarded beyond the submission, it has in general been supported.

Thus, anciently, "where the submission was of all matters between the parties at the time of the submission, and it was awarded that one of them should release to the other all demands to a day subsequent," it was held that this was void, because a demand might have accrued since the day of the submission, which the arbitrator had no authority to order to be released.[7] Yet, if in the submission there was a clause running thus, "so that the award be made concerning the premises," or something equivalent, and if the award was made with reference to that clause, this should control the construction of the award, and confine the operation of the awarded release to differences existing at the time of the submission.[8]

So, where the submission is of a *particular* difference, when there are other matters in controversy, though an award of a general release would have been void; yet the burthen of shewing the existence of these was thrown on the party objecting to the award on that account.[9]

[7] Moor v. Bedel, Gouldsb. 91, 92. cited 10 Co. 131. 2. Jenk. 264. Rol. Arb. B. 4.

[8] Vanlore v. Tribb, Rol. Arb. 21. Vid. 6 Mod. 232.

[9] 2 Mod. 309. Vid. Rous v. Nun, 1 Sid. 154. Alablaster v. Clifford, Rol. Arb. B. 23. Vid. Hob. 190. Gosse v. Browne.

The submission was, "of all suits and controversies between the parties concerning the tythes of corn and hay in a certain parish." The arbitrator awarded, that the defendant should pay to the plaintiff 40*l.* before a certain day, in consideration of which the latter should permit all suits and controversies depending between the parties to cease, and that they should be no further prosecuted. The plaintiff having set forth this award, averred, that there were not any other suits depending between them for the tythes of the parish. The defendant rejoined, that there were suits depending then between them, concerning a parcel of land in the same parish, but no controversy concerning the tythe. When the case first came before the court, they thought the award bad, as extending to subjects beyond the submission; on a further hearing, however, the plaintiff had judgment, and a writ of error being brought in the Exchequer-chamber, the judgment was affirmed, that court being of opinion, that the order "that all suits should cease," should be confined to suits relating to the tythes, and void only for the residue.[1]

*Must not be of parcel only of the things submitted.*

Another branch of the general rule, "that the award must be according to the submission," is, "that it must comprehend every thing submitted, and must not be of parcel only."[2] The purpose of the parties in submitting is, to have a final determination of every matter comprehended within their submission: that purpose is not obtained when the award only comprehends a part.

[1] Ingram v. Webb, 1 Rol. Rep. 362. 2 Rol. Rep. 192. Cro. Jac. 663.

[2] 19 H. 6. 6. Fhbt. Abr. 51. a. 39 H. 6. 11. b. semb. cont. Brooke Arb. 29.

This, however, must be understood with a considerable degree of limitation; for though the words of the submission be more comprehensive than those of the award, yet if it do not appear that any thing else was in dispute between the parties, beside what is comprehended in the award, the award will be good. As if the submission be of all actions real and personal; and the award be only of actions personal; it shall be presumed that no actions real were depending between the parties.[3]

So, it will be sufficient if the thing awarded necessarily includes the other things mentioned in the submission. As, where the submission was of the *right*, *title*, and *possession* of 20 acres of land, and the arbitrators awarded that one of the parties should enter into 10 acres, and have them to him and his heirs, and the other should have the other 10 acres for term of his life; this deciding apparently only the possession, yet in substance comprehending the right and title, is a good award.[4]

And where by a reference to something which the arbitrators suppose done, but which is in fact not done, it turns out, that of one particular point they have made no award, this shall not render the whole award void.

As where they awarded, that on one thing submitted to them the parties should perform the award made by former arbitrators, who had in fact made no award.[5]

[3] Vid. 8 Co. 98. 19 H. 6. 6. b. Brooke 44, 45. Rol. Arb. 51. a. Rol. Arb. L. 5.

[4] 10 H. 6. 6. Fhbt. Abr. 51. a.

[5] 39 H. 6. 9. b. Brooke Arb. 29.

So also, if the submission be of all the premises, or of any parcel of them, in this case the arbitrator may make an award of parcel only.[6]

If the submission be of all matters between the parties, and the award be made of all except a bond, and of this the award be that it shall stand, the award is good for the whole; for the arbitrator is not bound to discharge the bond without cause, and it shall be presumed that there was no cause.[7]

The condition of an arbitration bond was with a proviso that it should be made concerning the dilapidations of the parsonage of S. being and remaining in decay and ruin by the default and after the death of A. B. clerk late parson there, whose executor was one of the parties, and also of and upon all and singular actions, suits, quarrels, debates, and strifes, had, moved or depending in variance between the parties.

The award was, that the defendant, the executor, before a certain day, should repair the dilapidations at his own costs; but, in the award, the arbitrator protested that he would not meddle with any other actions, &c. besides. It was objected, that by this protestation the arbitrator had disabled himself to judge between the parties; for that this differed from the case "of a simple submission, in words which, in their natural meaning, might extend to *two* things, and an award of *one* of them; for there, in favour of the award, it was

[6] 39 H. 6. 11. b. Rol. Arb. L. 6.

[7] H. 14 Jac. Berrie v. Perrin, at Serjeant's Inn, judgment affirmed on a writ of error. Cro. Jac. 400. Bridgeman, 91. Rol. Arb. M. 2. S. P. resolved in Sallows v. Girling, Cro. Jac. 277.

to be presumed that no other matter was laid before the arbitrator but that on which he had decided; but here it appeared, by the express protestation of the arbitrator himself, that there were other matters in dispute beside the dilapidations, and he had not awarded according to the submission by refusing to take cognizance of these. In the report of this case in Dyer, it does not appear whether the objection was considered as well founded, as it was not averred that any other matter was in reality in dispute beside the dilapidations, nor is any judgment there reported to have been given.[8]

But in another report of the same case judgment is said to have been given for the defendant, the award being void.[9] And on another occasion it was held clearly by the court, that if arbitrators award for one thing, and say that they will not meddle with the rest, all is void, because they have not pursued their authority.[1]

With respect to the award being void or not, when it is made only of part of the subjects comprehended within the submission, there is a distinction arising from the form of the submission itself, which runs through all the books.[2]

The submission is sometimes general of all matters in difference between the parties, without specification of any particular subject of dispute. Sometimes it specifically enumerates the particulars.

[8] Dyer, 216, 217.

[9] Benl. 107.

[1] Dict. Barnes v. Greenwell, Cro. El. 858.

[2] Vid. Cro. Jac. 200, 354. Hob. 49. 4 Leon. 49. 2 Saund. 292. 2 Lev. 3. 2 Keb. 759. 3 Lev. 413. Cro. Car. 383. 2 Vent. 242, 243. Salk. 75. pl. 16. Lutw. 552.

Both forms are sometimes without any particular clause providing for the arbitrators deciding on the whole; and sometimes, to each, such a conditional clause is added, which, from the first words of it, when all legal instruments were in Latin, is called the clause of *Ita quod:* the words running thus: "So that the award be made '*of and upon the premises*,' before such a particular day." But it is not absolutely necessary, that, to produce its proper effect, this clause should exactly run in these words: "of and upon the premises" may be supplied by other words equivalent; "so as the *same* award be made and delivered by a particular day" admit of a similar construction, the "same" having a reference to every thing before mentioned.[3]

A proviso, that the award be made on or before a certain day, implies a proviso that it be made of the premises, though that be not expressed, and therefore all the qualities necessary to constitute a good award, where the proviso is full, are equally necessary in the other case.[4]

And where a provision is made for the appointment of an umpire, in case of a want of decision by the arbitrators, it is sufficient that the clause of *ita quod* be inserted with respect to the arbitrators, though it be not repeated with respect to the umpire; for the reference to the umpire is only an addition of time, and not the constitution of a distinct power.[5]

[3] Cro. El. 838. pl. 14. vid. Lutw. 202. Al. 52.

[4] Lee v. Elkin, 13 W. 3.

[5] 1 Keb. 791, 865. 1 Lev. 140.

Where the submission is of certain things specifically named, with this provisional clause, the arbitrator ought to make his award of all, otherwise it will be void.[6]

But where the submission is general of all matters in difference between the parties, though there should happen to be many subjects of controversy between them, if only one be signified to the arbitrator, he may make his award of that: he is, in the language of Lord Coke, in the place of a judge, and his office is to determine according to what is alleged and proved. It is the business of the parties grieved, who know their own particular grievances, to signify their causes of controversy to the arbitrator; for he is a stranger, and cannot know any thing of their disputes but what is laid before him. If any other principle prevailed, many awards might be avoided, says the same author; for one might conceal a trespass committed, or other secret cause of action, which he had against the other, and so avoid the award, which would counteract the very principle on which these domestic judgments are recognized by the law.[7]

And if, in the case of such a general submission, an award concerning one thing only be made, it shall be presumed till the contrary be shewn, that nothing else was referred to the arbitrator.[8]

[6] 8 Co. 98. Baspole's case. S. P. Hammond v. Hatch. Goldsb. 125. pl. 14. 19 H. 6. 6. Fhbt. Abr. 51. a. Rol. Arb. L. 9. [7 East, 81. Randall v. Randall.]

[7] 8 Co. 98. b. cited Hob. 49. Rol. Arb. l. 7. 8. Brownl. 63. 2 pt. 309.

[8] Vid. all these points adjudged. Middleton v. Weeks, Cro. Jac. 200. Ormlade v. Coke, Cro. Jac. 355.

Pending an action of trespass, the parties referred the matter to arbitration. The submission was, in general terms, of *all* actions, controversies, and suits between them: The award was in these words:—"Whereas there has been a suit at law, between the parties, that has run to a great expence on both sides; and it being left to me to make an end of it, I determine that they shall each of them pay his own charges at law; and that the defendant pay the plaintiff five shillings for his making the first breach in the law." The defendant, by consent of the plaintiff and leave of the court, pleaded this award, in bar of the action; one objection made to it was, that the submission purported to be of several matters, and the award was of one; but the court held unanimously, that as it appeared, that this particular suit was depending between the parties, and the arbitrator had decided on it, and the parties had not desired to be heard on any more than this one; there was no probable presumption that any other subsisted between them.[9]

And notwithstanding the provisional clause inserted in a general submission, it shall not be presumed, that any other difference appeared between the parties than those included in the award, unless it be shewn by the party objecting to it on that account.—Thus, where the submission was of all matters depending to the 29th of January, "so that, &c." and the arbitrators reciting that several matters were depending on the 29th of January, awarded, "of and concerning the premises," of all matters to the 28th of January; the award was held

[9] Vid. the Cobler's Award. 1 Bur. 274 et seq.

good, because it did not appear that any matter was depending on the 29th which was not depending before the 28th, and because, without special matter shewn, it should be intended a good award, with the averment, that it was made "of and upon the premises."[1]

The same determination has been given in many other similar cases,[2] and in one it was said by the court, that there was no occasion for an averment, that these were all the matters depending at the time of the submission; "now depending" could not be, unless they had been in suit before the 29th; because "a suit cannot be said to be begun and depending all on the same day."—I cannot, however, subscribe to the accuracy of this observation, nor can it at all apply to any other case, where the distance of time between that mentioned in the award, and the date of the submission, is more than one day.

Though the provisional clause be inserted in a general submission, yet it will be no objection to the award, that the arbitrator had notice of a demand of a certain sum by one party against the other, and that he made no award of that, if in other respects the award be good. Thus, where the award was, that the defendant should pay to the plaintiff several particular sums, on so many distinct accounts, and that on the payment of such sums, they should give to each other general releases; the defendant pleaded, that the plaintiff was indebted to him for fees and disbursements

[1] T. 7 Car. B. R. Ward v. Unwin, Rol. Arb. B. 24. Cro. Car. 216.

[2] Bussfield v. Bussfield, Cro. Jac. 577. Ley v. Paynes, H. 15 Jac. et eod. term. Maye v. Samuel, Rol. Arb. M. 5. Hob. S. C. 248.

as an attorney in the sum of 4*l.* that before the award made, he gave notice of this demand to the arbitrator, and offered to make it appear to him, and prayed that he would allow him that in the award; but that the arbitrator made his award as set forth by the plaintiff, without any allowance made, or consideration had of the said 4*l.* notwithstanding the notice; but it was held, that this was no objection to the award, because the arbitrator was not bound to make the allowance, as he might consider it as not a just claim; he was the proper judge whether it ought to be allowed or not, and he had given his judgment by ordering general releases.[3]

Where the reference is general "of all matters in difference between the parties," yet if one of them omit to assert any particular claim, and the arbitrator of course make his award without considering that demand, the party is not bound by the award from afterwards enforcing the claim omitted by a suit in the ordinary courts.

In an action of covenant the defendant, among other things, pleaded that in a former term an action was brought against him by the plaintiff for some other matter, on which "all matters in difference between them" had been referred to arbitration; that the arbitrator had ordered several sums to be paid to the plaintiff by the defendant, and that the parties should give each other general releases; and that the defendant had paid the money, and that general releases were given; the plaintiff replied, that the matters which were the subject of the present action were not

[3] Birks v. Trippet, 1 Saund. 32, 33.

before the arbitrator: the defendant demurred; and after argument Lord Mansfield said the only question was, whether a submission of all matters "in difference" was a submission of matters "*not* in difference;" and judgment was given for the plaintiff.[4]

In a subsequent action for money had and received by the defendant to the use of the plaintiff for eighteen bags of red Dutch clover, the defendant pleaded, among other things, an award; the plaintiff replied that the subject of the present action was not included in the matters referred: issue being joined on this, a trial was had before Lord Kenyon; the plaintiff called one of the arbitrators to prove that this matter had never been laid before them, and that consequently they had not taken it into their consideration, in forming their award; objection was taken to this evidence on behalf of the defendant, on the ground that the submission included "all matters in difference;" his Lordship thought he was bound by the terms of the reference to reject the witness; and non-suited the plaintiff; an application being made to the court to set aside the non-suit, Mr. Justice Buller referred to the case immediately preceding as having decided the point; a new trial was had; the witness was admitted, and the plaintiff had a verdict: a motion was made to have this verdict set aside and a new trial granted, on the ground that the reference being of "all matters in difference," the award was conclusive on the parties as to all causes of action subsisting between them previously to the sub-

[4] Golightly v. Jellicoe, Hil. 9 G. 3. B. R. 4 Term Rep. 147 in the Notes.

mission. The court held there was no colour for the motion, for that the plaintiff might undoubtedly shew that the subject of the present action was not a matter in difference between him and the defendant at the time of the submission, nor was referred by them to the arbitrators.[5]

These decisions are in perfect conformity with the rule of the civil law.[6]

An award of one particular thing, for the ending of a hundred matters in difference, is sufficient: as, where the submission was of all matters in controversy, and the award, taking notice of several matters, ordered the defendant to pay to the plaintiff four pounds, for arrearages of rent, and towards the repair of the house; this was held sufficient.[7]

In the case of a submission of specific subjects of difference, if no condition be annexed that the award shall be made "of and concerning the premises," it is said the arbitrator may make his award of any of them, without considering the others.[8] This, however, appears to be a hard measure of justice, unless it be accompanied with the qualification allowed in the case

[5] Ravee v. Farmer, 4 Term Rep. 146.

[6] De rebus controversiisque omnibus compromissum in arbitrum a Lucio Titio et Mœvio Sempronio factum est, sed errore quædam species in petitionem a Lucio Titio deductæ non sunt, nec arbiter de his quicquam pronuncinvit: quæsitum est an species omisse peti possint? Respondi, peti posse nec pœnam ex compromisso committi; quod si maligne hoc fecit, petere quidem potest, sed pœnæ subjugabitur.—Ff. l. 4. t. 8. s. 43.

[7] Hopper v. Hacker, 1 Keb. 738. 1 Lev. 132, 133.

[8] 8 Co. 98. a. M. 5 Jac. Middleton v. Weeks, Rol. Arb. L. 2. 3. Dict. pr, Maynard. 2 Vern. 100.

of a general submission, that the party may notwithstanding the award bring his action for the subject omitted. And indeed there is a case reported, in modern times, which, as far as a decision at *nisi prius*, reported by one whose authority is not the most respected in Westminster Hall, can be considered as an authority, directly contradicts the general principle here laid down.[9] This was an action of debt, on a bond conditioned for the performance of an award. At the trial, the Chief Justice is reported to have said, that the arbitrators were bound to make their award on all matters between the parties which had been laid before them, though there was no provisional clause of "*ita quod.*" And the arbitrators having overlooked some matters that had been laid before them in the present case, a verdict was given for the defendant.

As it is of several particular things, says Lord Coke,[1] so it is of several particular persons, and therefore, if two on one side and one on the other submit, the arbitrator may make an award between one of the two of the one part, and the other of the other part, and it will be good.[2]

Therefore where the submission was by two plaintiffs on one side, and defendant and his wife of the other, of all matters and controversies between them, "or any of them;" the award was held good, though nothing was awarded concerning the defendant's

[9] King v. Hammerton, 2 Geo. 2. 1 Barnard. K. B. 316.

[1] 8 Co. 98. a.

[2] Vid. 2 R. 3. 18. Brooke 44, cited Plowd. 289. 1 Keb. 885, contra. 1 Lev. 140. Bean v. Newbury, 16 Car. 2. B. R.

wife, on account of the words, "between them, or any of them."[3]

So, if A and B on one side, and C on the other, submit to the award of J. S. of all matters between them; J. S. may make an award of any matter between A alone and C, for the submission shall be taken distributively, and perhaps there was no matter between B and C.[4]

A submission of all matters between the parties, when there are more than one on one side, is the same as a submission of all matters between the parties, or either of them; and therefore, on such a submission, an award of a sum to be paid by one of the two to the single party is good; though it was objected, that the submission must be understood of joint demands, and that therefore an award of a separate debt was not within it.[5]

But if, in such a case, it appear in the submission, that there were differences between the person on one side, and all the parties on the other, and the submission be with the provisional clause, the award must comprehend all the parties, because the submission is under a condition that it shall do so.[6]

This distinction, "with respect to the submission being conditional or not," is said not to hold in the case of a reference by a rule by consent of parties in a court of equity; for there, it is said, unless the award comprehend all matters referred, it will be set aside, as not being a determination pursuant to the terms of refe-

[3] Hardres 399.

[4] Arnold v. Pole, Rol. Arb. D. 5. Carter v. Carter, 1 Vern. 259.

[5] Althelstone v. Moone et Willis, Comyns 547.

[6] Harris v. Paynter, Rol. Arb. O. 8. cited Lutw. 1638.

rence.[7] Perhaps something like a reason may be given for this apparent difference in the doctrine held on the two different sides of the hall.—And perhaps the difference is more in appearance than in reality.—In the conditions of submission bonds, though there may in fact be but one subject of dispute between the parties, yet a great variety of general and comprehensive words is frequently inserted, which would, if in fact there were ever so many subjects referred, include them all; but the insertion of which does not imply the existence of more than one. The courts of law, therefore, do wisely in imposing, on the party objecting to the award for this cause, the burthen of shewing that in fact a greater number of things were laid before the arbitrator than he has determined: but when a reference is by rule of a court of equity, a greater preciseness is probably observed in the description of the subjects referred, and, by omitting to decide on any one in particular, the arbitrator does not fulfil the intention of the court, which is to have as final a determination by his award as would have been made by a decree.

Or if the rule be drawn up in general terms, it cannot be less necessary in a court of equity than in a court of law, for the party objecting to the award, because it is less comprehensive than it ought to have been, to shew accurately that something was in reality in dispute which is not comprehended in the award.

*Must not be of any Thing against Law.*

If an award be of any thing which is against law, it is void, and the parties not bound to perform it.[8] As by the Roman law no penalty was incurred by non per-

[7] Hide v. Petit, 1 Ca. Ch. 186. Colwel v. Child, Id. 87.

[8] 19 E. 4. 1. Rol. Arb. G.

formance of any thing awarded which was dishonourable.[9]

And it was once held, that an award of a recompence for an injury, for which no damages are recoverable at law, was void: thus an award, "that the defendant should pay the costs of a suit, instituted against him for words," was held to be void, if the words were not actionable; and for that reason it was adjudged, that the words ought to appear in the award, that the court might determine whether they were actionable or not.[1]

But this has since been denied to be law, and it has been held, that the plaintiff is not bound to shew that there was cause of action, that being left to the arbitrators to determine who have power to award damages, though, in point of law, there was no cause of action, because the parties have made the arbitrators their judges.[2] (*k*)

*Must not be of a Thing impossible.*

An award of a thing which is not physically or morally in the power of the party to perform, is void; as that he shall deliver up a deed which is in the custody or power of a person over whom he has no control;[3] that he shall procure a stranger to be bound with him for the

[9] Non debent autem obtemperare litigatores, si arbiter aliquid non honestum jusserit. Ff. l. 4. t. 8. s. 21. n. 7.

[1] Vid. 1 Sid. 12.

[2] Hanson v. Liversedge, 2 W. and Mary. 2 Vent. 243. [To the same point expressly Shephard v. Watrous, 3 New York T. Reports, 166.]

[3] 12 Mod. 585.

(*k*) But when the plaintiff's demand is founded upon an *unlawful contract*, and the referees under a rule of court award it to him, the court

payment of a sum of money; for he cannot compel a stranger to be bound for him: or that he shall procure the justices of the Common Pleas to sit, in order that

court will set the award aside. This appears from the following case decided in the Supreme Court of Pennsylvania.

To a report of referees finding for the plaintiff the sum of 30,708 dollars, the defendant filed this exception, "That the balance reported to be due to the plaintiff, arose from a series of unlawful transactions, in violation of the acts of Congress, respecting the registering of vessels, and the duties on tonnage and impost; and consequently no court of justice could lend its aid to enforce the recovery." The facts were these: The defendant, an *alien*, deposited very large funds in the hands of a company of which the plaintiff was surviving partner; and, in consideration thereof, and of commissions for services, they undertook to purchase vessels and cargoes for him in their own names, and in like manner to import the return cargoes. They fulfilled their agreement, purchased a vessel for him, and procured it to be registered in their own names as the property of American citizens; in which vessel a cargo belonging to the defendant was imported and entered as their property. From the accounts and correspondence produced to the referees and in court, it appeared that the balance resulted from these illicit transactions; and that the sum reported for the plaintiff was about the amount of commissions, and interest upon occasional advances. The effect of the transactions was to defraud the United States of foreign tonnage, and of alien duties. *By the court.* "The positive provisions of the laws of the United States, respecting American registered vessels, the national policy of our navigation system, good faith towards the belligerent powers, and the very foundations of morality, have been violated in the course of the transaction now exhibited to us. The act of the court is necessary to give effect to the report of the referees; but no court of justice of the United States can lend its aid at any time or in any degree to recover a debt originating in a source so forbidden, so foul, and so pernicious." Report set aside. *Maybin* v. *Coulon.* 4 *Dall.* 298.

he may levy a fine;[4] or that he shall procure the lord of a manor to grant a copyhold, or a stranger to make a release or confirmation of an estate;[5] or to pay a sum of money at a day which was past at the time of the award;[6] but in this case he ought to pay the money, the payment being the essence of the award, and not the payment on a particular day: that he shall enter into an obligation to the other *immediately* after the award; for some time is necessary.[7] Yet perhaps at the present day "immediately" would be construed "within a reasonable time." An award, however, that the one party shall infeoff the other in an acre of land, and *immediately* after deliver up the title deeds; or enter into a bond, and immediately after pay the money, would be good, because neither of them is impossible.[8]

But an award, that the defendant shall be bound with sureties, such as the plaintiff shall approve, is void; for it may be impossible to force the approbation of the plaintiff.[9]

So, we are told, an award is void which orders the party to do something which has been already done, or which, if it were done, would not be effectual to answer the purpose intended: as if it be awarded, that A shall release to B the surety of the peace which he has against him in the King's Bench, when, in fact, before that, B has purchased a supersedeas out of Chancery, directed to the justices to discharge the sureties in the King's

[4] 19 Ed. 41. 1. Rol. Arb. F. 2. 3. 4.
[5] 28 H. 6. Mo. 3. pl. 3.
[6] 8 Ed. 4. 21. Rol. B. 17.
[7] 18 Ed. 4. 1. Rol. Arb. E. II. 1.
[8] 18. Ed. 4. 21. Rol. Arb. E. II. 2.
[9] 3 Mod. 272, 273.

Bench, because he had found sureties in Chancery, and the justices have accordingly discharged them.—Or if it be awarded, that he shall release his suit against B, when in fact he had no suit against him; or that he shall release all his right in a certain manor, when in fact there is no such manor, or he has no right in it.[1]

And in general, in this respect, a distinction is made between the case of a bond, and that of an award; for if a man bind himself to do a thing which it is not in his power to do, it is reckoned his own folly, and he forfeits his bond by non performance: but the duty of an arbitrator is to judge reasonably and impartially between the parties, and he departs from that principle, when he orders any thing which it is not physically or morally in the power of the parties to do.[2]

But it is no objection to the award, that it is difficult for the party to perform it, from the accidental narrowness of his circumstances; as if it be to pay 20*l.* when he is not worth a groat, or to give 20 tons of wine when he has not one.[3]

And, if the party's doing that which is awarded will have weight with the court to give effect to it, he ought to do it; as in the case of releasing the other from sureties of the peace, where he is bound to keep the peace towards the releasor and all the king's subjects; though, by his release, he cannot discharge the party so bound, because every subject has an interest in the recognizance:[4] yet he ought to release, because his

[1] 21 Ed. 4. 38. 39. Br. Arb. 40.

[2] 19 Ed. 4. 1. Rol. Arb. F. 2. 3.

[3] Id. ibid. cont. 18 Ed. 4. 1 Rol. Arb. E. II. 2. F. 2.

[4] 21 Ed. 4. 40, 41.

release shewn to the court will be an inducement to them to discharge the recognizance.[5]

In the case, too, of an award that one of the parties shall procure a stranger to do a thing, a distinction is taken between the case, where he has no power over the stranger to compel him, and that where he has power, either by the common law, or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good; as if a stranger to the submission be seised to the use of one of the parties, and the arbitrator award, that the latter shall cause the feoffee to uses to give a release to the other who is in possession; this is good, because the *cestuy que use* has such interest and power over the feoffee, that by subpœna out of Chancery he can compel him to release.[6]

So, if it be awarded that one shall pay a sum of money to the other, and that in consideration of that he shall acquit him of a bond in which they are both bound to a third person; here, though a third person be in some measure to concur, yet it is held, that the award is good; for if the penalty of the bond be not incurred, he may discharge the principal sum at the day; if the penalty be forfeited, he may pay, and compel the obligee in equity to deliver up the bond.[7] The same observation applies to an award that one of the parties shall discharge the other of his undertaking

[5] 2 Hawk. Leach. 257. Quæ. et vid. as to the release of sureties of the peace, Jenk. 136.

[6] 17 Ed. 4. 5. b. Rol. Arb. F. 1.

[7] Darsey v. Clipsham, March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

to pay a debt to a third person.[8] On the same principle, it is said, that, admitting no objection will hold to an award of a discontinuance, or of a nonsuit, on account of its not being final, such an award is good; though there must be an act of the court, for it is in the power of the party, says Rolle, to make default, or to deny the action.[9]

*Must be reasonable.* As an award must not be of a thing impossible, so neither must it be of a thing unreasonable. Therefore, an award, that the one party shall serve the other for any period of time, is void; for it is unreasonable, as being contrary to the first principles of civil liberty.[1] On the same principle, an award is void which orders the party to do a thing, in the performance of which he may subject himself to an action from another: thus, in the times of ancient nicety, an award was considered as void, which ordered the party to pay money "in" the house of a stranger, because he could not enter the house of a stranger without committing a trespass. But, that he should pay the money "at" or "near" the house, was held good, because he might go to the house without entering it and committing a trespass:[2] unless the owner of the house has land adjoining to it, so that the party cannot come to the house without trespassing on the land, for then the award was considered as void.[3] But

[8] Becket v. Taylor, 1 Mod. 9.

[9] Rol. Arb. F. 5. 6.

[1] 9 E. 4. 44. Rol. Arb. B. 12.

[2] Rol. Arb. E. 2. where many cases are cited. Linsey v. Ashton, 2 Bulst. 39. Anon. 1 Keb. 92. Rol. Arb. F. 10. 1 Rol. Rep. 6.

[3] Taverner v. Skingley, Rol. Arb. E. 3.

even in those times, if the house *at* which the payment was to be made was a common inn, the award was considered more favourably.[4] And now an award to pay *at* or *in* the house receives the same construction, and is taken to imply a licence to go to the house;[5] especially, if it be in the house of the arbitrator himself, for there a licence shall be presumed.[6] Or at least the party may pay at the door of the house, if he cannot obtain permission of the master to pay it in the house.[7] It is on the principle of being unreasonable, that an award, "that one of the parties shall pay only part of a debt due," has been considered as void, if it appeared on the face of the award that more was really due.[8] But where it does not appear by the award that a larger sum is really due, but that it is only in demand, an award of a less sum is good. And if the submission be of all matters in difference, though the arbitrator do not directly take notice of any other matter but the demand of the larger sum, it shall be presumed, in support of the award, that the arbitrator saw, upon the whole, that nothing more was due than he has given. Thus, where to debt on bond for performance of an award, the defendant pleaded "no award made;" and the plaintiff in reply set forth an award, in which the arbitrators took notice of 72*l.* being in controversy for rent due, and awarded 50*l.* in full satisfaction and general releases to be given: but it did not appear by

[4] S. C. Cro. Car. 226.

[5] Alley v. Cox, 27 Car. 2. 3 Keb. 479.

[6] Freem. 205.

[7] Holland v. Helwis, 3 Lev. 153.

[8] Cont. 45 Ed. 3. 16. where it is by simple contract. Br. 44. b. acc. Rol. Arb. J. 4.

the award that any other matter had been in controversy, though the submission was general, the court were of opinion that the award was good; and further remarked, that it was singular the objection should come from the defendant, in whose favour the award was; for by his objection he insisted on paying 72*l.* instead of 50*l.* The strength of the objection, however, must have been, that the award for a less sum was void, because payment of the less sum in pursuance of it, if the award was not good, would not be a bar to the plaintiff in another action for the original debt.[9]

On the same principle, of being unjust and unreasonable, it has been held, that, where the question in dispute was the taking away of the plaintiff's goods, an award, "that he should have part of them returned, and that the defendant should retain the rest," is void.[1] But if it had appeared that there was a dispute about the property of the goods, an award "that the plaintiff should have part, and the defendant should retain the rest," might have been sustained; for then it must have been understood, that the arbitrator adjudged the property of so much as he ordered to be retained, to have been in the defendant.

*Must be advantageous.*

An award must not be of a thing which is merely nugatory, without any advantage to the parties; therefore an award that one of them shall go to Rome, or to St. Paul's, is void, for it can be of no service to the other.[2] So if a man and

[9] Godfrey v. Godfrey, 2 Mod. 304.

[1] Cont. M. 45 E. 3. 16. Br. 44. b. Acc. Rol. Arb. J. 5.

[2] 9 Ed. 4. 44. Rol. Arb. J. 11.

woman submit to arbitration, and it be awarded that they shall intermarry, this is not binding; for one reason, among others, that it cannot be presumed to be advantageous to them.[3] So it is not a good award that one shall give a release to the other of land in satisfaction of an action, if he to whom the release is to be made has nothing in the land at the time, for that can be of no service to him.[4] But, in such a case, if he to whom the release is to be made be seised of the land, such an award will be good, though he who is to give the release has no right in it; for it is an advantage to have such a release, to bar the releasor if he should afterwards pretend to have title to the land. So, if before submission, one of the parties had executed a release made in favour of the other, but had retained it in his own hands, and then, on submission of all matters, the arbitrator had awarded that he should deliver up all the evidences concerning the land, in satisfaction of a certain action; if he had not delivered the release, this would have been a breach of the award; the award is good, though it be only to give the party his own evidences, it being an advantage to him to have them without an action.[4]

Mutual releases are advantageous, and therefore an award of them is good; and the condition of a bond to stand to an award will be broken, by not giving them, though there be no other means of compelling performance than by an action on the bond.[5]

[3] Id. ibid. et Rol. Arb. J. 10. 10, 11, 12, 13, 15.

[4] Vid. all these points adjudged, 9 E. 4. 44. a. b. Rol. Arb. J.

[5] Id. ibid. et vid. Freem. 52.

But the courts formerly went further than merely to require that an award should be advantageous; they required that it should give something which appeared expressly to be a recompence to the plaintiff against whom it was pleaded. On this principle, it is held in many places,[6] that an award that each party shall be quit against the other of the trespasses committed on one another, because these trespasses were equal, is not a bar to an action by one of them for the original trespasses, because, say the books, one must have a recompence. In other places,[7] however, such an award is held to be good, as indeed there seems no rational objection to it. On the principle of a recompence being necessary, an award "that the plaintiff shall have his goods again, which had been taken by the defendant," it is said, is not good, because it gives no satisfaction for the taking and detention;[8] but, that if it be added that they shall be carried to such a place at the expence of the defendant, this is a satisfaction: it is, however, no more a recompence for the taking and detention, than the award without the addition of this clause.

Even in those times it was allowed, that an award, that "whereas each is indebted to the other in 40*s*. the one shall go quit against the other is good, because it is a sufficient satisfaction.[9]

[6] 43 Ed. 3. 28. b. 29. a. Brooke, 44. b. Rol. Arb. J. 1. 21 H. 6. 22 H. 6. 39 a. 9 Ed. 4. 44. Fhbt. 51. b.

[7] 10 H. 6. 14. Br. 43. 19 Ed. 4. 8. Br. 38. Rol. Arb. J. 7.

[8] 12 H. 7. 14, 15. Vid. 45 Ed. 3. 16. Rol. Arb. J. 3. Br. 32.

[9] 19 H. 6. 37. b. Rol. Arb. J. 6.

release shewn to the court will be an inducement to them to discharge the recognizance.[5]

In the case, too, of an award that one of the parties shall procure a stranger to do a thing, a distinction is taken between the case, where he has no power over the stranger to compel him, and that where he has power, either by the common law, or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good; as if a stranger to the submission be seised to the use of one of the parties, and the arbitrator award, that the latter shall cause the feoffee to uses to give a release to the other who is in possession; this is good, because the *cestuy que use* has such interest and power over the feoffee, that by subpœna out of Chancery he can compel him to release.[6]

So, if it be awarded that one shall pay a sum of money to the other, and that in consideration of that he shall acquit him of a bond in which they are both bound to a third person; here, though a third person be in some measure to concur, yet it is held, that the award is good; for if the penalty of the bond be not incurred, he may discharge the principal sum at the day; if the penalty be forfeited, he may pay, and compel the obligee in equity to deliver up the bond.[7] The same observation applies to an award that one of the parties shall discharge the other of his undertaking

[5] 2 Hawk. Leach. 257. Quæ. et vid. as to the release of sureties of the peace, Jenk. 136.

[6] 17 Ed. 4. 5. b. Rol. Arb. F. 1.

[7] Darsey v. Clipsham, March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

that the defendant should enter into a bond to the plaintiff, that the plaintiff and his wife should enjoy the land; this was held to be void, because the arbitrator had fixed no certain sum for the penalty of the bond; and there was no means by which the sum could be ascertained; for it was held, that this did not resemble the case of a covenant by the party himself, to enter into a bond for the enjoyment of land, in which, if no sum be expressed in the covenant, it is implied that the penalty shall be equal to the amount of the land.[6]

Two submitted all matters in controversy between them, and it was awarded that the one should pay to J. S. the one half, and the other the other half of a certain debt due to J. S. by two strangers, who were bound to J. S. at the request of the two submittants; though the sum in which the two strangers were bound was averred in the plea in which this award was pleaded, yet two justices against one[7] held the award was bad, for uncertainty in not having mentioned the sum. But one[8] of the two thought that this might have been aided, by an averment that the two strangers were bound to J. S. in no other obligation but this.[9]

The submission was "of all controversies concerning the right, title, and possession of 200 acres of land, called *Kelstorne Linge;* it was awarded, that in the

[6] Samon's case. 5 Co. 77, 78. Rol. Arb. Q. 1. 4. Cro. El. 432. pl. 40. Mo. 359. pl. 489.

[7] Doderidge and Houghton, Montague e contra.

[8] Houghton.

[9] Gray v. Gray, Rol. Arb. Q. 2. 3. Cro. Jac. 525. Godb. 275.

*waste* lands of the vill of Kelstorne, the one should have the brakes growing there during his life, paying to the other 2*s.* per annum, but in the award no name was given to the land where the brakes grew; and for this reason the award was held to be void for uncertainty, nor would the court admit the aid of an averment, that the land where the brakes grew "was the said land called Kelstorne Linge in the submission, and no other nor diverse:" because they said they could not expound the intent of the arbitrators.[1]

The condition of a bond being to perform the award of J. S. made between A. and B. of all controversies and demands between them, it was awarded, "of and concerning the premises," that A. should permit B. to enjoy certain leases of certain lands then in his possession, which were the lands of W. S. and then the inheritance of A.—B. paying the rents, and performing the covenants in the leases, and that B. should pay the *arrears* of rent due to A. after his purchase: notwithstanding an averment that there were two shillings of the arrears of rent then due, the award, as to the payment of the arrears, was held void for uncertainty, because it did not appear by the award, at *what* time after the purchase, the rent became due; for that B. the lessee, could not know at what time A. the plaintiff, purchased the reversion of W. S nor had he any means of knowing it, unless A. or W. S. would inform him, which he could not compel them to do.[2]

Perhaps, in the three last cases, the courts appear to have been abundantly nice; the same observation

[1] D. 8 El. 242. 52. per curiam. Rol. Arb. Q. 5.

[2] Massey v. Aubrey, after verdict for the plaintiff. Rol. Arb. Q. 9.

does not apply in an equal degree to some of those which follow.

To an action on the case for the value of a quantity of malt, the defendant pleaded a submission to arbitration, and an award that he should pay to the plaintiff so much for each quarter as a quarter of malt was then *sold* for; the award was held to be void for uncertainty, because it was not mentioned in what place the price was to be taken, and perhaps in one market it might be sold for a greater price than in another.[3]

An award, "that the defendant shall deliver certain goods particularly named, and three boxes, and *several* books, without naming the books," is liable to the same objection of uncertainty: the books should have been particularly described, unless it had been said that the books were within the boxes, by which they would have been sufficiently ascertained.[4] So, an award, "that one of the parties shall deliver up to the other a certain writing obligatory, or a certain bill obligatory which he had before," is altogether uncertain, for it does not say of what sum, nor of what penalty the bond is, nor of whom it was obtained.[5]

The same thing has been said of an award "that one of the parties should give security for the payment of a sum of money," either in one gross sum, or at different specific times, or annually for life; because, it is said, he cannot tell what kind of security is meant, whether by bond or otherwise.[6]

[3] Hurst v. Bambridge, Rol. Arb. Q. 7.

[4] Cockson v. Ogle, 13 W. 3. Lutw. 550.

[5] Bedam v. Clerkson, 1 Ld. Raym. 124.

[6] Duport v. Wildgoose, 2 Bulstr. 260. Thynne v. Rigby, Cro. Jac. 314. Tipping v. Smith, 2 Str. 1034.

release shewn to the court will be an inducement to them to discharge the recognizance.[5]

In the case, too, of an award that one of the parties shall procure a stranger to do a thing, a distinction is taken between the case, where he has no power over the stranger to compel him, and that where he has power, either by the common law, or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good; as if a stranger to the submission be seised to the use of one of the parties, and the arbitrator award, that the latter shall cause the feoffee to uses to give a release to the other who is in possession; this is good, because the *cestuy que use* has such interest and power over the feoffee, that by subpœna out of Chancery he can compel him to release.[6]

So, if it be awarded that one shall pay a sum of money to the other, and that in consideration of that he shall acquit him of a bond in which they are both bound to a third person; here, though a third person be in some measure to concur, yet it is held, that the award is good; for if the penalty of the bond be not incurred, he may discharge the principal sum at the day; if the penalty be forfeited, he may pay, and compel the obligee in equity to deliver up the bond.[7] The same observation applies to an award that one of the parties shall discharge the other of his undertaking

[5] 2 Hawk. Leach. 257. Quæ. et vid. as to the release of sureties of the peace, Jenk. 136.

[6] 17 Ed. 4. 5. b. Rol. Arb. F. 1.

[7] Darsey v. Clipsham, March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

to pay a debt to a third person.[8] On the same principle, it is said, that, admitting no objection will hold to an award of a discontinuance, or of a nonsuit, on account of its not being final, such an award is good; though there must be an act of the court, for it is in the power of the party, says Rolle, to make default, or to deny the action.[9]

*Must be reasonable.* As an award must not be of a thing impossible, so neither must it be of a thing unreasonable. Therefore, an award, that the one party shall serve the other for any period of time, is void; for it is unreasonable, as being contrary to the first principles of civil liberty.[1] On the same principle, an award is void which orders the party to do a thing, in the performance of which he may subject himself to an action from another: thus, in the times of ancient nicety, an award was considered as void, which ordered the party to pay money "in" the house of a stranger, because he could not enter the house of a stranger without committing a trespass. But, that he should pay the money "at" or "near" the house, was held good, because he might go to the house without entering it and committing a trespass:[2] unless the owner of the house has land adjoining to it, so that the party cannot come to the house without trespassing on the land, for then the award was considered as void.[3] But

[8] Becket v. Taylor, 1 Mod. 9.

[9] Rol. Arb. F. 5. 6.

[1] 9 E. 4. 44. Rol. Arb. B. 12.

[2] Rol. Arb. E. 2. where many cases are cited. Linsey v. Ashton, 2 Bulst. 39. Anon. 1 Keb. 92. Rol. Arb. F. 10. 1 Rol. Rep. 6.

[3] Taverner v. Skingley, Rol. Arb. E. 3.

release shewn to the court will be an inducement to them to discharge the recognizance.[5]

In the case, too, of an award that one of the parties shall procure a stranger to do a thing, a distinction is taken between the case, where he has no power over the stranger to compel him, and that where he has power, either by the common law, or by bill in equity. In the former case the award is void, for so much as concerns the stranger. In the latter it is good; as if a stranger to the submission be seised to the use of one of the parties, and the arbitrator award, that the latter shall cause the feoffee to uses to give a release to the other who is in possession; this is good, because the *cestuy que use* has such interest and power over the feoffee, that by subpœna out of Chancery he can compel him to release.[6]

So, if it be awarded that one shall pay a sum of money to the other, and that in consideration of that he shall acquit him of a bond in which they are both bound to a third person; here, though a third person be in some measure to concur, yet it is held, that the award is good; for if the penalty of the bond be not incurred, he may discharge the principal sum at the day; if the penalty be forfeited, he may pay, and compel the obligee in equity to deliver up the bond.[7] The same observation applies to an award that one of the parties shall discharge the other of his undertaking

[5] 2 Hawk. Leach. 257. Quæ. et vid. as to the release of sureties of the peace, Jenk. 136.

[6] 17 Ed. 4. 5. b. Rol. Arb. F. 1.

[7] Darsey v. Clipsham, March. 18. 1 Rol. Arb. page 248. n. 11. vid. ante page.

to pay a debt to a third person.[8] On the same principle, it is said, that, admitting no objection will hold to an award of a discontinuance, or of a nonsuit, on account of its not being final, such an award is good; though there must be an act of the court, for it is in the power of the party, says Rolle, to make default, or to deny the action.[9]

*Must be reasonable.* As an award must not be of a thing impossible, so neither must it be of a thing unreasonable. Therefore, an award, that the one party shall serve the other for any period of time, is void; for it is unreasonable, as being contrary to the first principles of civil liberty.[1] On the same principle, an award is void which orders the party to do a thing, in the performance of which he may subject himself to an action from another: thus, in the times of ancient nicety, an award was considered as void, which ordered the party to pay money "in" the house of a stranger, because he could not enter the house of a stranger without committing a trespass. But, that he should pay the money "at" or "near" the house, was held good, because he might go to the house without entering it and committing a trespass:[2] unless the owner of the house has land adjoining to it, so that the party cannot come to the house without trespassing on the land, for then the award was considered as void.[3] But

[8] Becket v. Taylor, 1 Mod. 9.

[9] Rol. Arb. F. 5. 6.

[1] 9 E. 4. 44. Rol. Arb. B. 12.

[2] Rol. Arb. E. 2. where many cases are cited. Linsey v. Ashton, 2 Bulst. 39. Anon. 1 Keb. 92. Rol. Arb. F. 10. 1 Rol. Rep. 6.

[3] Taverner v. Skingley, Rol. Arb. E. 3.

say for what term the reassignment shall be, whether for years, for life, or in fee; it shall be understood to be for the whole interest mortgaged.[5]

Where the submission was of all controversies, respecting a voyage, and it was awarded that, one should pay his part of the expences of the voyage, and allow, on account, his proportion of the loss which should happen to the ship during the voyage; this was held good, because the expences and the loss might be ascertained by calculation.[6]

" To pay the charges of a suit" is sufficient; for these may be ascertained by the attorney's bill.[7] So, " that the one shall pay to the other all such moneys as he had expended about the prosecution of a suit;" for that may be ascertained by shewing what was in fact laid out.[8] So, " that the defendant shall pay as the plaintiff and his attorney, by a bill and oath shall make appear." [9]

So it might be supposed, an award between executors, " that the one should pay the testator's charges, debts, &c. in the Spiritual Court, as far as his assets went," would be good, because both the charges and the assets might be ascertained.[1]

So, it might be supposed, " an award of a sum, provided the party to whom it is awarded make affidavit of it before a magistrate," might be supported; but an

[5] Rosse v. Hodges, 1 Lord Raym. 234.

[6] Beale v. Beale on demurrer, Rol. Arb. H. 24.

[7] Cro. Car. 383.

[8] Hanson v. Liversedge, 2 W. and M. 2 Vent. 242.

[9] Rous v. Lun, 1 Keb. 569. et vid. acc. Linfield v. Ferne, 3 Lev. 18 et ante p. 135.

[1] Semb. cont. Messenger v. Freeman, 3 Keb. 508.

award that he shall make such an affidavit as the other party shall require, is bad for the uncertainty of what affidavit he will require.[2]

It is no objection to an award, that it is conditional, as that one of the parties shall enjoy a house for three years and a half, and shall pay his rent every half year; and that if he fail in payment, the award for the enjoyment of the house shall be void.[3] So that he shall pay the other 10*l.* on condition that each shall acquit the other; for it shall be taken as a positive injunction that they *shall* acquit one another.[4]

So it may be made with a penalty, to attach on the non-performance of a preceding part; as to pay 12*l.* on two several days, and on default of payment the first day, to pay the whole 12*l.* immediately after.[5]

And, where it is left to a subsequent event to ascertain precisely the thing awarded, it will be sufficient if that event must necessarily happen; as if the submission be with respect to a way leading to a house, and the award be, that the one shall give a bond of 300*l.* to the other, payable at three years' end; and in case the way be taken away, then that he shall pay less by a certain sum, and if not, a certain sum more.[6]

An award in the alternative, that the party shall do one thing or another, is not subject to the objection for uncertainty; for, when he has done one of the things, he has performed the award; as if the award be, that

[2] Backwell v. Knipe, 3 Keb. 293.

[3] Furser and Bond v. Prowd, Cro. Jac. 423.

[4] Linfield v. Ferne, 3 Lev. 18.

[5] Kockill v. Wetherel, 2 Keb. 838.

[6] Collet v. Powell, 2 Keb. 670.

he shall deliver up to the other party a certain deed, or pay him 50*l.* this is sufficiently certain; and such an award in the alternative seems to be the best mode of compelling a party to exert himself to procure the performance of what is not strictly within his own power; as in the case before mentioned, if the deed were in the custody or possession of another over whom he had no control, the award would be void, if it simply ordered that he should deliver up the deed, because it might not be in his power to obtain it from the person, in whose possession it was: but the alternative of delivering the deed, or paying 50*l.* will be a motive for him to use his endeavour to have the deed delivered up; and if he cannot, the 50*l.* will be some sort of recompence to the other for the want of it: perhaps, in justice, the other is intitled to have the deed, and it is withheld from him in consequence of some misconduct of the first; it is therefore but justice, that, if he cannot have the deed itself, he should have a penalty equivalent to the damage he may sustain by the loss of it.[7]

Lord Chief Justice Coke is said to have applauded the wisdom of Chief Baron Manwood, in adopting this expedient of an alternative award, to enforce the performance of something, for which, had it been awarded simply, the award, according to some rules of construction, would have been void.

No objection can be taken to an award for want of certainty, because it appoints no time or place for the payment of a sum of money, though it be in the power

[7] Vid. Lee v. Elkins, 12 Mod. 585, 586. Lutw. 545.

of the arbitrator to appoint a time for payment, or for doing any collateral act; because the award shall have a reasonable construction; the party shall have a reasonable time to pay the money; a demand within a reasonable time shall be sufficient to entitle the opposite party to recover: and the place is perfectly immaterial.[8] In this respect the English law exactly corresponds with the civil.[9]

*When Uncertainty may be helped by an Averment in pleading.*

An averment, in some cases, may be admitted to support an award which has an appearance of being uncertain.[1] Thus, wherever, from the nature of the thing, the award may be ascertained by a reference to something else, there an averment will help it; as if it be, "to pay the money expended in a certain suit," an averment "that so much was expended," will support it.[2]

So, where the description of a matter in dispute, is not exactly the same in the award as it is in the submission, an averment in pleading "that the thing so differently described, is the same thing," will be sufficient to support the award: thus, where the submission

[8] 2 Browol. 311. 1 Keb. 92. et vid. Phillips v. Knightly, Str. 903. 1 Barnard. 84. 151. 463.

[9] Solutioni diem posse statuere arbitrum puto: et ita et Trebatius videtur sentire. Ff. l. 4. t. 8. s. 21. n. 2. Intra quantum autem temporis, nisi detur quod arbiter iusserit, committatur stipulatio, videndum est. Et, si quidem dies adjectus non sit, Celsus scribit, inesse quoddam modicum tempus: quod ubi præterierit, pœna statim peti potest et tamen si dederit ante acceptum judicium, agi ex stipulatu non poterit. n. 12.

[1] Dict. per Gould, J. 1 Lord Raym. 612.

[2] Vide ante page 202.

was concerning an enclosure between *Barton* Down and *North* Down, and the award purported to be an enclosure, between the *defendant's* down and the down of *I. S.* it seems to have been admitted, an averment "that the enclosure mentioned in the award, was the same with that mentioned in the submission," would have supported the award: but for want of such an averment, the plaintiff failed in his action.[3]

But if there be no means by which the thing, uncertainly awarded, can be reasonably ascertained, no averment of the party will make it good.—Thus, if it be awarded "that the one party shall pay to the other so much money as shall in conscience be due," such an award cannot be supported by an averment, "that any particular sum is due in conscience." It was the express business of the arbitrator to ascertain the sum.[4]

So, an award, "that the defendant shall pay the plaintiff for certain task work, and days work, without fixing a value," cannot be aided by an averment, "that the work was worth so much and no more."[5]

Where it does not appear from the award itself, that it was made "of and upon the premises," an averment in pleading, "that it was," it is said, will not help it: as where money was awarded to be paid by one party to the other, but it was not said, on what account, nor was it professed to be made "of and upon the premises:" the allegation of the party that it was so made, was held not sufficient to support the award

[3] Withers v. Drew, Cro. El. 676. pl. 5.

[4] Watson v. Watson, Sty. 28.

T. 3. Car. B. R.

[5] Pope v. Brett, 2 Saund. 292.

in this part.[6] Yet it seems difficult to conceive a reason, why it should not have been presumed to have been made "of and upon the premises," rather than otherwise.—However, it is laid down in the more ancient reports, as a thing not to be disputed, that, where the award is not referred by the arbitrators to the subject in submission, or is not any generality comprehending it, the averment of the party that it is all one, cannot expound the intent of the arbitrators.[7] As if the submission be of a manor, and an award be made of an acre, and it does not appear by the award itself, that this is parcel of the manor; it cannot be made good by an averment that it is.[8]

So, where it was awarded, that the defendant should pay to the plaintiff 3*l.* 10*s.* but it was not said for what; Hobart held that this implied nothing, nor could it be helped by averment. Yet in the same place he says, that, if an action were brought for the trespass, no doubt this award might be pleaded with an averment. But why an award should be pleaded in bar of an action for the cause, on the submission of which the award was made, though that award cannot be enforced, seems to require some explanation. However, Hobart adds, "that there was no judgment given in this case; for though he himself was, and continued at the time when he reported the case, to be clearly decided, and the rest concurred, yet there was some varying after-

[6] Bacon v. Dubarry, 1 Ld. Raym. 346. 12 Mod. 129.

[7] Dyer 242. b. pl. 52. M. 7 and 8 Eliz.

[8] Per Co. Ch. J. concessum per Doderidge, but Houghton doubted: but Coke said this is Dyer's case.

wards, and so it hung, and he thinks it was compounded, for he heard no more of it." [9]

*Must be final.*

As the principal object which parties have in view, when they submit to arbitration, is to prevent any future litigation on the subject of the submission, no rule is better founded than that which requires that an award should be final.[1]

It is on this principle that it has been uniformly held, that an award that each party shall be nonsuited in the action which he has brought against the other, is not good, because a nonsuit does not bar them from bringing a new action.[2] An award ought to have four qualities, says Newton; it ought to be a final determination; the parties ought to be bound by it for ever; it ought to inflict a penalty on him who does not perform it; and it ought to be such, that performance may be compelled by the law: an award of a nonsuit, continues he, is deficient in all these respects: it is not final, and the party is not perpetually bound by it, because he may bring another action; and he cannot be compelled by the law to be nonsuited.—What is meant by the requisition "that the award should inflict a penalty on him who will not perform it," does not appear very intelligible; it cannot be supposed that it is meant, that every award should be in the alternative, "do this, or suffer a forfeiture on failure of performance," for very few awards are so penned: neither can it be supposed, that it is intended that the thing itself

[9] Hob. 49, 50. Nichols v. Grunnion.

[1] Non differendarum litium causâ, sed tollendarum ad arbitrum itur. Ff. l. 4. t. 8. s. 37.

[2] 19 H. 6. 36. Fhbt. 51. a. b. Brooke, 45. a.

which is awarded, should contain any mystic virtue, which should deter the party from disobedience. The last requisite clearly refers to that distinction which was anciently taken between an award for money, and an award of any thing "collateral;" the word "collateral" being technically used to contradistinguish money from every thing else: for in those times, an award for any "collateral" thing could not be enforced, unless there was a bond for performance; if, however, there was a bond for performance, the party might forfeit the penalty of his bond by not being nonsuited as well as by not doing any other specific thing. Another objection is indeed made to an award of a nonsuit, "that the party cannot be nonsuited without a judgment, and that, therefore, the nonsuit is in part the act of the court. But this objection would extend to the award of every act, to the accomplishment of which the concurrence of the court, or of a third person, is necessary; yet, in the very same place where this objection is taken to the award of a nonsuit, it is laid down that an award "that one of the parties shall levy a fine" is good, though a fine cannot be levied without the act of the court.[3] The only well-founded objection, therefore, that can apply peculiarly to the award of a nonsuit, is this, that it is not final, because it does not bar the party from bringing another action. Had the question, indeed, remained yet undecided, it might have been said, in analogy to the construction put on other cases, that he, who suffered a nonsuit, but afterwards brought another action, nominally performed the award, but in substance was guilty

[3] 5 H. 7. 22. Fhbt. 52. b.

of a breach: however, the word "nonsuit" seems to be so peculiarly appropriated to express one particular idea, that its meaning cannot be so far extended, as to imply a breach of such an award, in bringing another action: for "that an award of a nonsuit is not final," has been uniformly held from the time of the year books, to the present day.[4]

It was formerly doubted, whether an award "of a discontinuance of an action," was not equally liable to the objection of not being final, as that of a nonsuit, because the party is not bound by a discontinuance from bringing another action.[5] It was soon, however, distinguished from the case of the nonsuit, by observing that the discontinuance was altogether the act of the party, namely, the making default and not prosecuting his action; how little this distinction affects the question, may be conceived, by what has been observed a little above.—However, Rolle tells us that, "if it be awarded, that each shall discontinue the actions which he has against the other," this is good: but his opinion seems not to be founded on the principle of such an award being final; for he immediately adds: "but it is otherwise, when one is ordered to discontinue, and the other to give a release, *because then the parties have not an equal advantage.*"[6] But in another place, it is mentioned as a thing decided, "that an award to continue or discontinue a suit" is good, because it is in the

[4] Vid. the places before cited, and Rol. Arb. T. 15. 16. 17. F. 9. 7. 6 Mod. 232. 1 Barnard. K. B. 463.

[5] Vid. the places above cited.

[6] Dict. 1 Rol. Rep. 362. cites 19 H. 6. 36.

power of the party to do it or not: and now it seems to be taken for granted, that no objection can be taken to such award.[1]

An award, "that the party shall enter a *retraxit* in a suit which he has depending, is clearly final, because, after a retraxit, the plaintiff cannot bring another action for the same cause.[9]

An award, "that all suits shall cease," is final: it shall be taken as if it had been said that all suits shall cease for ever; no new suit can be brought, while those ordered to cease are depending, because they may be pleaded in abatement to the others, nor can these be prosecuted because of the award; that operates as a release, and consequently extinguishes the right; for if a man release his action, and have no other remedy for his right but the action, that discharges the right; in the same manner determining the suit, determines the right of the thing, because he has no other remedy but by suit, and therefore the award is final. (*l*)

So, an award, "that a bill in Chancery shall be dismissed," is final: it shall be taken to mean, "that the suit shall cease for ever;" that alone being a substantial dismission.[2]

So, "that what is awarded on one side, shall be in full of all debts and demands on the other," will aid

[7] Per G. Croke, in the case of Gray. Godbolt. 276.

[8] Vid. 1 Barnardiston, 463.

[9] 5 H. 7. 22. Fhbt. 52. b. Brooke Arb. 31. Rol. Arb. F. 7.

[1] Squire v. Greville, 6 Mod. 33. 2 Ld. Raym. 961, 964. 1 Salk. 74. vid. Tipping v. Smith, 2 Str. 1024, which seems contra.

[2] Knight v. Burton, 6 Mod. 232. 1 Salk. 75.

(*l*) An award that "the said suit shall be no further prosecuted" is sufficiently final, and is a good bar to another action for the same cause. It is as if the arbitrators had said "The defendant shall be no further prosecuted

the award, so far as what is awarded on the other is not completely final; for the word "demands" extends to every thing which the one has a right to demand or exact from the other at the time of the submission.[3]

An award, "that the plaintiff in an action shall not prosecute nor proceed in the same term," is good.[4] But it is said that an award "that each party shall bear his own expences in suits depending between them," though not liable to the objection of not being mutual, is bad for want of being final, without the addition "that the suits shall cease."[5] Now, however, it is apprehended, it would be presumed, that it was the intent of the arbitrators that the suits should cease. And this opinion is supported by the judgment in the following case. To an action of trespass, and false imprisonment, the defendant pleaded an award which run in these words, "Whereas there has been a suit at law between the parties, that has run to a great expence on both sides; and it being left to me to make an end of it, I determine that they shall each of them pay their own charges at law; and that the defendant pay the plaintiff five shillings, for his making the first breach in the law." The court were unanimously of opinion, that this was a fair and reasonable award, and that it must necessarily be presumed the suits were to cease, and the five shillings to be paid by the defendant, to be taken as a discharge.[6]

[3] Knight v. Burton, 6 Mod. 232. 1 Salk. 75.

[4] Gray v. Gray, Cro. Jac. 525.

[5] Farmer v. Durant, 2 Keb. 351.

[6] 1 Bur. 274. Hawkins v. Colclough, vid. ante page 177.

ed upon the charge." *Purdy* v. *Delavan*, 1 *N. York T. R.* 304. But in this case the submission recited that the parties had already agreed to *discontinue* the suit; and of course the arbitrators must have intended something more than merely to terminate the particular action.

By the civil law, if the arbitrator declared "that the one party owed nothing to the other," though he did not prohibit the latter to sue, yet, if he did, notwithstanding, sue, he forfeited the penalty of his submission.[7] And with us, at this day, if there have been suits depending between the parties before the submission, though the arbitrator take no notice of the costs, yet if he award mutual releases, it shall be presumed that he meant each should pay his own costs.[8] And without such releases the same presumption would very probably be made if there were no other objection to the award.

With respect to a bond which the one party had against the other, it was awarded, "that the obligee should not prosecute, nor cause to be prosecuted, any suit against the obligor on the said bond;" this was held to be sufficiently final; it was objected, indeed, that the award did not extinguish the duty, by merely ordering that he should not sue; it was however answered that this should be taken according to the *effect* of the words, which was to extinguish the duty.[9]

If the award be as final as the nature of the thing will admit, that is sufficient. Marshall, at the instigation of Knightly, brought a qui tam action against Philipps, on behalf of himself and the poor of a parish: Philipps, for himself, and Knightly, on behalf of Marshall, submitted, by bond, all matters in difference

[7] Si Arbiter pronunciasset, "Nihil videri Titium debere Seio;" tametsi Seium non vetuisset petere, tamen, si quid petiisset, videri contra arbitri sententiam fecisse. Ff. l. 4. t. 8. s. 21. n. 1.

[8] Dict. per Buller J. Hil. 1791.

[9] Milwood v. Stokes, Rol. Arb. O. 7.

between the parties, to arbitration. It was awarded, that Knightly should execute a *covenant* to indemnify Philipps against all costs, damages, and expences which might happen by means of any further proceedings in the qui tam action: an action on the submission bond being brought, and after "no award" pleaded by the defendant, this award being set forth in the replication, one objection was taken to it, as not being final, not putting an end to the suit, but only giving a new action of covenant; it was indeed allowed, by the judge,[1] who supported this objection, that if a bond had been awarded to the plaintiff, to indemnify him in the suit depending, that would have been good; for there the arbitrators would have ascertained the penalty, as the consequence of his not performing the award: and though, by executing this bond, he had satisfied the arbitration bond, and the plaintiff's remedy was of course gone upon that, yet there subsisted as effectual a remedy on the bond awarded to be executed, as there was upon the other. But, in the present case, by the execution of the deed of covenant, the plaintiff's remedy on the arbitration bond was gone, and there was only a remedy on the covenant left in its stead, which was a satisfaction in damages to be ascertained by a jury.—But the other judges thought that the award was sufficiently final, and that at any rate, it was not competent to the defendant to make this objection; the arbitrators had in this case done every thing they possibly could do to render their award final; they could not have awarded that Marshall should dis-

[1] Page J.

continue the suit, which he had brought on behalf of himself and the poor of the parish, for that would have been to divest an interest out of the poor which was vested in them by the commencement of the action: and there was no difference between the award to execute a bond or to execute a covenant, the remedy was by action in both cases.[2]

If the award be of a thing to be done at a future day, it is final, if it must then be absolutely done, as if it be to pay money at three several days to come.[3] So, to give a note or a bond, for the payment of money at a future day.[4] But if it depend on a condition whether it must be executed or not, then it is not final; as if it be, that money shall be refunded if it appear afterwards that the party was not entitled to retain it.[5]

It was awarded, "that if one of the parties should, within four months after the date of the award, make out, that two tons of freight were discharged by him at 16*l.* per ton; and that if the other, within ten days, should make oath that he received the two tons of freight at 10*l.* per ton, and not more, then that the first shall pay him 12*l.* more than was awarded to him in the former part of the award, being the difference on two tons at 16*l.* and 10*l.* per ton." The inclination of the court

[2] Philipps v. Knightly, Str. 903. 1 Barnard. 84, 151, 387, 457, 463. Fitzg. 54, 168, 270, but in the latter book, it seems the *qui tam* had been brought by the plaintiff in the present action, and that it was he who was awarded to covenant to indemnify, in return for which the defendant in the present action was to pay him a sum of money.

[3] Per Dodderidge. Palm. 110.

[4] Booth v. Garnett, 2 Str. 1082.

[5] Palm. 110.

seemed to be to consider this award as void, because it was not final at the time of making it.[6]

The same opinion was held where it was awarded that the one should pay so much money to the other, and the latter should give him a release, provided that if the first should be discharged of any arrears due to soldiers by an act of indemnity, then the award should be void.[7] So, an award "that, if the plaintiff, on account, prove certain articles against the defendant, then he shall pay so much money as the plaintiff was damnified therefore," is not final.

So, also, "that if the defendant make out, upon oath before a judge, any disbursements laid out on account of the plaintiff, then the plaintiff shall pay them; but in case the defendant do not prove these matters within a certain time limited, then the parties shall give general releases;"[8] this is not final.

Where the first part of an award is final, and a proviso is afterwards added, giving a power to either of the parties to render it void, by an act to be done within a limited time *after* that appointed for the performance of that which makes it final, the proviso is repugnant to the former, and will be rejected.—Thus, if it be awarded, "that each of the parties shall, within four days after the award, release to the other, all actions, suits, and demands, before the date of the submission bond, with a proviso, that if either of the parties shall be discontented with the award, or any

[6] Dighton v. Whiting, 6 W. 3. Lutw. 51.

[7] Kinge v. Fines, 1 Sid. 59.

[8] Selby v. Russel, Comb. 456.

[9] Id. ibid.

part of it, then, if within twenty days after the day for making the releases, the party thinking himself aggrieved shall pay 10*s.* to the other, the award shall be void, and either of them be at liberty against the other as before the award:" this proviso being repugnant to that which was to be *executed* before, shall be rejected, and the former part of it shall be valid; for every award ought to be reasonable and indifferent between the parties, and one part of it not repugnant to the other; but here it would be contrary to these principles to consider the award as totally void, and to set the parties at liberty, the one against the other, when they had made mutual releases; or to permit the one, when the other had released, to dissolve the award, by means of the proviso. And it would be absurd to consider the submission-bond as forfeited, as it must be, by not making the release within the four days, and afterwards to consider it as becoming not forfeited, by the dissolution of the award, in consequence of the proviso.[1]

But where the proviso is not merely repugnant to the other part of the award, but so connected with it, that, on the construction of the whole, the award is not final, there the whole award is void.—As if in the last case the proviso had been, "that either of the parties might render the award void, by paying the 10*s.* within the four days limited for the making of the releases;" for here the award is not final, it being left to the parties to determine whether it shall be so or not.—So, if the proviso had been, "that within twenty

[1] Dict. arg. by the court in Sherry v. Richardson, Poph. 15, 16.

days after the *award* made, it might be defeated on the payment of 10*s.*" for here the 10*s.* might have been paid within the four days as well as at any subsequent time within the twenty, and the party not bound to make the releases, because, before the expiration of the time within which they were to be made, that would have been done which the arbitrator intended should render the award void; and therefore the award not being final at the time when it was made cannot be supported.[2]

*The award must be mutual.*

The last rule to be observed in the constitution of an award is, that it shall be mutual; that it shall not give an advantage to one party, without an equivalent to the other. This rule seems to have arisen from an idea of justice misapplied: understood in the general sense which the words of it convey, it supposes, that it is impossible for two parties, who submit to arbitration, not to have committed mutual injuries; and that it is equally impossible for a man to make a groundless complaint against his neighbour: some of the ancient cases shew, that the judges adopted the rule to this extent.

If two submit themselves to an award of all trespasses, and the arbitrators award, "that the one shall make amends to the other, but award nothing that he shall do to him again," this, say the judges, is a void award; for all is for the one party, and nothing for the other.—Here they suppose it impossible for the injuries not to have been mutual.

If it be awarded, it is said, "that one shall go quit of all actions had by the other against him, and nothing

[2] Dict. arg. by the court in Sherry v. Richardson, Poph. 15, 16.

be said of the actions which the other has against him," this is void. If the defendant plead, 'that the plaintiff and he submitted all complaints between them to arbitrators, who awarded, "that the defendant should go quit of all actions and complaints had by the plaintiff against him, without saying any thing of the actions and complaints which the defendant had against him," the plea is bad,' because, adds the court, the one should be discharged of all actions, and the other would receive nothing in satisfaction: here they would not presume that the defendant had no action or complaint against the plaintiff, nor that the complaint of the latter against the former was, in the opinion of the arbitrator, without foundation.

They do, however, admit, that if it be expressed by the award, that the injuries were mutual, and equal, and that therefore nothing is given on either side, this will be good.—Thus, if the award recite that the plaintiff had committed a trespass against the defendant, and that the defendant had committed a trespass against the plaintiff, and for that reason order, "that the one shall be quit against the other, and the other against him:" this they say is a good award, because it is mutual.[3]

The principal requisite, however, to form that mutuality, about which so much is said in all the cases usually classed under this rule, is nothing more than that the thing awarded to be done, should be a final discharge of all future claim by the party in whose favour the award is made, against the other for the

[3] 7 H. 6. 41. 21 H. 6. 9. cites same case. 22 H. 6. 39. Br. Arbit. pl. 23

cause submitted; and therefore the present rule amounts to nothing more than a different form of expression of the case, which requires that an award should be final. Thus, in the same places where it is required that an award should be mutual, it is held, that an award, "that one party shall pay to the other a certain sum of money, *in consideration of a debt long due*," is good: and the reason given is, that the party paying the money shall be discharged of the debt, which is a sufficient reciprocity to support the award.[4]

The most frequent complaint against awards for the want of mutuality is that when something is awarded on one side, there is no release awarded to the other in return; for it is uniformly held that a release would render the award mutual; but the release must operate to the benefit of the principal in the submission, and not be confined to his attorney, who submits for him; at least this is the conclusion to be drawn from a case, the authority of which has not yet been overruled. An attorney, on behalf of his client, submitted by bond to perform an award: it was awarded that the attorney should pay to the other party 345*l.* and that the attorney and the other party should give mutual releases, namely, that the other party should sign a release to the use of the "attorney," and the attorney to the other party: this was held to be an award only on one side: the attorney, it was said, submitted on behalf of his client, and nothing was awarded to his client, the release not being expressly awarded to the use of the latter, but to that of the attorney: and then the award

[4] 8 Co. 98. a. Rol. Arb. K. 5.

being only that the attorney should pay the money, without saying on what account, it is not good without the releases; but it was admitted, that if the release had been to the use of the client instead of the attorney, the award would have been mutual, and therefore good.[5] The place of the release, however, may frequently be supplied, by words from which it must reasonably be concluded that the arbitrator meant the party, against whom the award is made, should be discharged on performance of it. Thus, in the case preceding, it was admitted in argument, that if the money had been awarded to be paid by the attorney, "in satisfaction of all accounts," or "for all money due" from the client; or if the award had purported to be made, "of and upon the premises;" the award would, in any of these cases, have been good without the releases, because then the payment of the money would of itself have been a good discharge to the client.

So, it has been admitted that an award "that all suits should cease" was equivalent to an award of a release.[6]

So, that all "controversies" shall cease, and that the one shall pay 10*d.* to the other, although the other have nothing given to him; for perhaps, say the books, he had committed the greater trespass.[7]

An award was made "of and upon the premises," that one should pay to the other 10*l.* at a certain day, and that the parties aforesaid should continue in love and friendship as formerly; it was held to be an award on

[5] Bacon v. Dubarry, Comb. 439. 1 Ld. Raym. 146.

[6] Strangford v. Green, 2 Mod. 228.

[7] Cole's case, 8 Jac. Rol. Arb. K. 10. S. P. Harris v. Knipe, 13 and 14 Car. 2. 1 Lev. 58.

both sides, and that it should be intended in satisfaction of all matters between the parties, more especially as it was said, that the parties should be friends as formerly.[8]

If two submit all matters between them, and the award be made "of and upon the premises, in manner and form following," that is to say, that the one shall pay 40*l.* to the other; it is said, this is a good award on both sides, for being made concerning the premises it cannot be intended to have been made but in satisfaction of all matters within the submission, and cannot be taken to have been for any other cause.[9] But about the same time, it is said, that, where an award was made "of and upon the premises, in manner and form following," namely, that the one shall depart from his house, and remove his hay, and pay to the other 3*l.* this was an award only on one side, because it was not made of the premises *generally*, but *in manner and form following*.[1] Yet this is exactly in the same terms as the introduction of the award in the case immediately preceding.

As an award "that money shall be paid in satisfaction" is good, so other words may sometimes have the same effect; thus, it is a good award "that the one shall pay 10*l.* to the other *for* a trespass;" the word "for" implies that it is to be in satisfaction of the tres-

[8] Raymond v. Popley, and on the same award Popley v. Popley in the same term. T. 8 Car. on demurrer in debt on the bond, and a breach assigned in non-payment.—Rol. Arb. K. 12. vid. etiam Id. O. 1. 2.

[9] Mawe v. Samuel, 1 Rol. Rep. 1. 2. Rol. Arb. F. 6.

[1] M. 13 Jac. Nichols v. Grunwin, Rol. Arb. K. 11. Brownl. 58. S. C. Hob. 49. in which last place it is said that no judgment was given.

pass.[2] Or "to pay so much for arrears of rent;" for that shall be taken "in satisfaction of all arrears, and the party discharged by payment."[3] So, "for having made the first breach in the law," implies that the sum awarded shall be taken in satisfaction.[4] Yet, where the submission was of all suits depending between the plaintiff and defendant in the Spiritual Court "for tythes;" and it was awarded, that the defendant should pay 40*s.* to the plaintiff "for the tythes" on such a day; it was held, that this award was not mutual, because nothing was awarded for the advantage of the defendant, as that he should be free of suits, or something equivalent: it may be observed, however, that the award, being of 40*s.* "for the tythes," it must necessarily be implied, that the 40*s.* were intended to be in satisfaction.[5]

An award recited that there had been considerable dealings between the plaintiff and the defendant, that the plaintiff had paid to the defendant all his demands, and that 40*l.* were due to the plaintiff, and then ordered that the defendant should pay to the plaintiff the 40*l.* It was held, that the recital of the dealings between the parties, and of the payment by the plaintiff of all that was due on his part, implied that the payment of the 40*l.* by the defendant was intended to be in full satisfaction of the debt.[6]

[2] Ormlade v. Coke, Cro. Jac. 354. S. P. Hob. 49. Freem. 205. 266.

[3] Hopper v. Hackett, 1 Lev. 132.

[4] 1 Bur. 277. ante p. 177. 212.

[5] Colston v. Harris.

[6] Elliott v. Cheval, Lutw. 541.

It was awarded that the defendant should pay to the plaintiffs 15*l.* on or before a certain day, which the arbitrators adjudged to them for the costs and damages they had sustained by reason of a suit commenced against them without cause by the defendant, and that all suits and differences should cease which were between the parties before the date of the submission bond: it was objected that the award was not mutual, because it was no benefit to the defendant to stay his own suit and pay 15*l.* costs; but the objection was considered to be without foundation; as indeed nothing but the grossest misconception of the real meaning of the rule, which requires awards to be mutual, could have given *rise* to such an objection.[7]

In the more ancient reports, however, the rule seems to have been so understood, that either the thing which was awarded must of itself imply a discharge to the party against whom the award was made, or some positive terms must have been added which shewed the arbitrator's intention that a discharge should be the consequence;[8] for otherwise, it was thought, it could not be known for what cause the thing awarded was to be done, and therefore nothing could be presumed to be discharged by it.

If it had been awarded that the obligor, in a single[9] bond, should pay the debt, if it was not added that he should thereupon be discharged, the award was held not binding for want of mutuality, because the payment

[7] Watmough v. Holgate, 2 Vent. 221, 222. S. P. Comb. 212.

[8] May v. Samuel, Rol. Arb. F. 3. Kirkby v. Pigot, 25 Car. 2. 3 Keb. 140.

[9] It may not be altogether useless to observe here, that a *single* bond means a bond without a penalty.

of the money due by a single bond could not be pleaded to an action on the bond, without a release.[1] But this reason, since the statute for the amendment of the law,[2] has no longer any weight.

If it appeared, however, by the general tenor of the award, that the thing awarded to be done on one side was intended as a recompence for injuries sustained by the other, that was considered as rendering the award sufficiently mutual, without any words of discharge.

An award 'reciting the submission to have been of all differences between the parties: reciting also, that these differences being understood by the arbitrators, who were satisfied that certain allegations, made in a bill exhibited by the plaintiff in the Star-chamber against the defendant, were for the most part known to the latter to be true, namely, "That the defendant had taken of the plaintiff 40*s.* for a supersedeas to reverse an outlawry against the plaintiff, but had not reversed it; that he had taken of the plaintiff 20*s.* more as a fee pretended to be due to him on an execution for 26*l.* sued against the plaintiff; neither the defendant, who was then under-sheriff of Dorset, nor any one for him, having ever enforced the execution; that the plaintiff had been imprisoned, by means of the defendant, by one J. S. who had arrested him without any warrant directed to him, and that the plaintiff had been compelled by J. S. to pay 20*s.* for this unjust arrest, before he was permitted to go at large:" reciting further, that the plaintiff was an honest man and of good reputation, and a tradesman, having a wife and six children,

[1] Hob. 49. Brownl. 58.

[2] 4 Ann. c. 16. s. 12.

and that by reason of the circumstances before recited he had sustained great damage, scandal, and discredit:' ordered the defendant to pay to the plaintiff 500*l.* by different payments, on certain specific days.—It was objected to this award, that it was not mutual, because the 500*l.* were not awarded to be paid in satisfaction of the wrongs recited, nor in consideration of them, nor for them, nor were there any words which implied a discharge to the defendant: but the court held the award good, and that the payment of the 500*l.* must necessarily be intended to be as a satisfaction for the wrongs.[3]

And it may, now, be safely laid down, that it is not necessary that the award itself should express that a sum awarded to be paid, or an act to be done in favour of one of the parties shall be in satisfaction; or that it should contain any equivalent terms: a discharge to the other must necessarily be presumed from the payment of the sum or the performance of the act.—Thus, the defendant having pleaded to an action of trespass, that the plaintiff and he had submitted the trespass aforesaid to arbitrators, who had awarded that the defendant should pay to the plaintiff 7*l.* on a certain day, and also two-thirds of such costs as he had been put to in and about the suit, the submission having been after an imparlance: this was held to be good, though no releases were awarded, nor any words of satisfaction were used.[4] (*m*)

[3] 16 Car. B. R. Burbidge v. Raymond in a writ of error on a judgment in C. B. where it had been adjudged a void award on demurrer. But B. R. affirmed the judgment for a clear defect in the manner of pleading, though they thought the award good.—Rol. Arb. K. 17.

[4] Tomlinson v. Ariskin, Comyns 328.

(*m*) So upon a submission of all things relating to a suit brought by A. against B. for an assault and false imprisonment of D. the ward of A., an award that

It seems indeed a little extraordinary that the plaintiff, in whose favour the award was made, should have objected to it, for so singular a reason as that the money to be paid to him by the defendant was not awarded to be in satisfaction or discharge of any thing, and that nothing was awarded to be done *to* the defendant or for his benefit: the objection can be reconciled to common sense on no other principle than a supposition that had the plaintiff sued on the award the defendant might have objected to it for the reasons now assigned by the plaintiff.

To an action on a bond, conditioned for the performance of an award, the defendant pleaded that no award was made: the plaintiff in his replication set forth an award, "that the defendant should pay to the plaintiff 12*l.* on a particular day, and take away his mare and colt from the plaintiff's within a week:" this was held to be a mutual award, because it should be presumed, that the possession which by the award the plaintiff appeared to have of the mare and colt was legal, as by distress for damage feasant, by bailment, or other means by which the plaintiff might have justified the detention.[5]

These two cases seem fully to justify the observation which immediately precedes them. The first is indeed the case of a parol award, and it does not appear whether the second was by parol or in writing: the condition of the bond enabled the arbitrator to make his award in either way, and the replication only states that he made and published his award within the time

[5] Cooper v. Hirst, Lutw. 539.

that "B. should pay to A. guardian of D. the sum of 112 dolls.; and each settle with his own witnesses," was held to be mutual; as the payment must be deemed to be in satisfaction of the injury. Weed v. Ellis, 3 N. York T. R. 253.

So

limited, but does not allège in what manner: there seems, however, to be no good reason for making any distinction, in this respect, between an award by parol and one in writing.

All the preceding rules apply only to particular parts of an award; but there are many cases in which, though the award, in particular parts, be void, because these are not conformable to some one or other of these rules, yet it is good for the remainder. And there are also a great many cases in which the circumstances of its being void for part renders it void for the whole: but in order to consider this part of the subject with advantage, it seems proper to collect what is to be found in the books with respect to the construction of awards.

*How awards shall be construed.*

In former times, the courts considered awards, with respect to their construction, in a very different manner from that in which they considered deeds and wills: the latter, they held, ought to be construed according to the intent of the parties, and the meaning of the words to be collected from the whole of the instrument put together; but an award they considered to be in the nature of a judgment, which ought to be plain and correct, and that therefore there ought to be no necessity to collect the meaning of the arbitrators; for that such a collection would not be their judgment, but the conjecture of another of what they had intended to decide.[6]

The adherence of the courts to this rule was in many instances so rigorous and strict, that the power

[6] Brownl. 92. Yelv. 98.

So where a submission was of all questions, disputes, and controversies touching the destruction of A.'s barn, for which A. had instituted a suit against B. and also recited an *agreement to discontinue the said suit*, an award "that the aforesaid suit shall be no further prosecuted, and that A. should "pay unto B. 14 dolls. 68 cents, in full for his costs and expences in de- "fending the aforesaid suit, and also for his expences and attendance in "this arbitration,"—without any thing more, was held to be mutual and final. *Purdy* v. *Delavan*. 1 N. York T. R. 304.

of referring disputes to arbitration, instead of being a benefit to the parties, often well merited that reflection which a learned judge once made with respect to references at *nisi prius*, that he never knew any good to arise from them.

In those times, even a mistake in the recital of a day mentioned in the former part of an award, was thought sufficient to render the award void, though it would otherwise have been good. Thus where, on a submission of the title of copyhold land, the arbitrator, after awarding the payment of a small sum of money by one of the parties, on the "twenty" first day of May, ordered the other to release to him on the aforesaid first day, omitting the word "twenty," all his right to the copyhold land, and that three years after he should make further assurance: the award was held to be void, on account of the omission of the word "twenty," because there being no such day before mentioned as the first of May, there was no day from which the three years could be calculated, and consequently no further assurance could be made.[7] The court thought they were not at liberty either to supply the word "twenty," which would have given effect to the intention of the arbitrator, or to reject the word "aforesaid," which, though a little deviating from his meaning, would have made the award completely certain.

Towards the end of the reign of James the first however, the judges laid down more liberal rules to be

[7] Markham v. Jennings, Rol. Yelv. 97, 98. Arb. K. 15. Q. 6. Cro. Jac. 149.

observed in the construction of awards; holding, that they should be interpreted, as deeds, according to the intention of the arbitrators; that they should be considered, with the same favour as the "arbitrium boni viri," in the civil law: that therefore they should not be taken strictly, but liberally, according to the intent of the parties submitting, and according to the power given to the arbitrators: that "all actions" mentioned in the award should be taken to mean "all actions over which the arbitrators have power by the submission;" and that if there were any contradiction in the words of an award, so that the one part could not stand consistently with the other, the first part should stand, and the latter be rejected: but that if the latter were only an explanation of the former, both parts should stand.[8]

So, it was held, that if an award were made generally in satisfaction of all controversies, without any limitation, this should be construed to extend only to such controversies as are within the submission.[9]

If, by manifest implication, that appear, which, if positively expressed, would render the award good, that is sufficient to support it.

The submission was of all controversies between the parties, and it was awarded, "that the one should pay to the other 10*l.* on a particular day, and that the other, on the receipt of the 10*l.* should give to the first a general release." It was objected, that if he to whom the 10*l.* were to be paid refused to receive it, he

[8] Dict. per Doderidge. Palm. 108. 3 Bulstr. 66, 67.

[9] Brown's case, cited Hutton, 9.

was not bound to give the release, and the award, for that reason, was only on one side, and therefore void: but the objection was overruled, and the award held to be good; because, when it is awarded that the one shall pay 10*l.* to the other, it is, by necessary implication, awarded that the other shall receive it: in the same manner as if it had been awarded that the payment should be in satisfaction of all controversies between them, in which case it must have been implied that the other should receive it in satisfaction: in the present times it will appear strange that there should have been any necessity for the judgment of a court in this case, but in the reign of Charles the first, the matter was so far from being clear, that the unsuccessful party not being satisfied with the judgment of the court below, appealed to parliament in a writ of error, where the judgment was confirmed by the opinion of all the judges.[1]

An award "that the one shall keep and enjoy the goods in dispute, "paying" so much money to the other," must be construed in the same manner as if it had been expressed imperatively, "that he should pay."[2]

It was awarded "that the defendant should pay 10*l.* to the plaintiff, and fetch away his mare and colt;" it was objected, that it was not awarded that the plaintiff should deliver the mare and colt: it was adjudged, that that must necessarily be implied.[3]

[1] M. 22 Car. B. R. Linnen v. Williamson, Rol. Arb. K. 16. cited 6 Mod. 35. 2 Ld. Raym. 965.

[2] Stiles v. Triste, 1 Sid. 54.

[3] Hooper v. Hirst, Lutw. 539. cited 1 Ld. Raym. 612.

So, it might reasonably be supposed, that, where the award was, "that the plaintiff, for work done, should "accept" a bill of sale from the defendant, of the eighth part of a ship," there could have been no harm in implying that the defendant should "give" the bill of sale: in common language, a man cannot *accept* a thing, which it is not in his option to have, and it could not be in his option to have it, unless the other was bound to *give* it.[4]

On the same principle, it would seem that an award, "that the plaintiffs should pay 30*l.* to the defendant, and that they should receive their goods left by the defendant in the hands of a third person for their use," were good, and that the defendant should be bound to procure the delivery of the goods.[5]

It was awarded "that the defendant should enjoy a house of which the plaintiff was lessee for years, during the term, paying to the plaintiff 20*s.* yearly:" this was construed not to be merely a condition annexed to the award of the defendant's enjoyment of the house, but it was considered to be a part of the award itself, that being evidently the intention of the arbitrators: and it was held, that an action of debt on the bond, would lie for the nonpayment of the 20*s.*[6]

The submission was of certain controversies respecting a wine licence, and the arrears of rent issuing out of certain land; the award was in such terms as these, "that whereas it appeared to the arbitrators that 15*l.*

[4] Dis aliter visum. Clapcott v. Davy, 1 Ld. Raym. 612.

[5] But semb. contr. Dighton v. Whiting, Lutw. 51.

[6] Parsons v. Parsons, Cro. El. 211. S. P. M. 18 and 19 El. inter Tressam et Robins.

remained due to the plaintiff, they ordered that the defendant should pay him 7*l.* 10*s.* in satisfaction of so much of the 15*l.* and should assign to him the wine licence:" it was held, in the first place, that though it was not expressed on what account the defendant was indebted to the plaintiff, it should be presumed to be for no other cause than for the rent; and secondly, though it was not said that the wine licence should be assigned in satisfaction of the residue of the 15*l.* the better opinion was that it should be so presumed.[7]

Where the words of an award have any ambiguity in them, they are always to be construed in such a manner as to give effect to the award.—Thus, if money be awarded to be paid "in full of all demands;" these words shall be construed to mean "in full of all demands up to the time of the submission only, not to the time of the award, or to the time of payment."[8]

On a submission by the parson and part of his parishioners on behalf of themselves and the rest, with respect to tythes, it was awarded, that each of the parishioners should give the parson notice, when he intended to sheer his sheep; in answer to an objection that the award was unreasonable, because the parishioner must follow the parson wherever he might be, in order to give him notice, it was held, that the award must be construed to mean that the notice should be given at the parsonage-house.[9]

It was awarded that the defendant should pay to the plaintiff so much money on the first of April, and so much on the first of May; and that the parties should

[7] Al. 51.

[8] Per Powell J. 6 Mod. 35.

[9] Litt. 30.

pay 1*l.* 5*s.* each to the arbitrators for their trouble; and that "on payment of the money aforesaid" on the first of May, they should give mutual releases: here the words "on payment of the money aforesaid," coming after the award of the money to the arbitrators, it was contended they should be referred to the whole, as well to the money to be paid to the arbitrators as to that to be paid to the plaintiff by the defendant; and, according to the opinion which then prevailed, the award being void as to the former, because performance of it could not be compelled, and the releases not being awarded to be given till performance, it was insisted the award was void for want of mutuality: but the court held that these words, "the money aforesaid," should be referred only to those sums with respect to which the award was good, and not to the money awarded to be paid to the arbitrator.[1]

An award, reciting that so much money had been disbursed by one party, as was *alleged*, ordered that money to be paid by the other: in favour of the award, the court held that this should be understood as alleged, and not controverted or disproved: and that it should not be supposed that the arbitrators did not inquire into the matter, or that they awarded payment from the mere allegation of the disbursement.[2]

It was awarded, that the defendant should pay to the plaintiff 8*l.* on the 14th of April, "and that he should deliver to the plaintiff a certain writing obligatory, or a certain bill obligatory, which he had be-

[1] Abrahat v. Brandon, 10 Mod. 201.

[2] Knight v. Burton, 6 Mod. 232.

fore," and that *then* the one should make to the other general releases. In favour of the award, the court held, that the word *then* should be referred to the 14th of April, and not to the delivery of the bond to the plaintiff, that the objection to the uncertainty of the intervening phrase might not excuse the payment of the money.[3]

A misrecital of the submission shall not avoid the award: thus, where it appeared by special verdict that the submission bond of the plaintiff was dated on the 22d of February, and that of the defendant on the 9th of March; but the award recited the latter to have been on the same day with the former; this was held not to be material.[4] So where the submission was dated on the 10th of February, and the award recited as of the 7th.[5]

Nor is it any objection that money is awarded to be paid at a place by name with the addition of the word "aforesaid," though the place has not been mentioned before; the word "aforesaid," in such a case, is to be rejected as surplusage.[6]

If the submission be "so that the award be made on or before a particular day, or that the arbitrators shall choose an umpire," and the umpire so chosen make an award, reciting that the parties had bound themselves to stand to his award; though compared to the words of the submission, this be not literally true, yet an ob-

[3] Raym. 123.
[4] Al. 85. 87.
[5] Toll v. Dawson, 1 Vent.
[3] Bedham v. Clerkson, 1 Ld. 184.
[6] Lambard v. Kingsford, Lutw. 558.

jection on that account will not be allowed, because it is but recital.[7]

Where the submission contains the clause of "ita quod," and the award is made with reference to that clause, this shall control the construction of the award in such a manner as to support it, though the words in their natural signification be more comprehensive than the submission, and it shall be intended that nothing was in controversy but what was comprehended in the submission, unless the contrary be shewn: and on the contrary, if the words of the award be not so comprehensive as those of the submission, yet, unless the contrary be also shewn, it shall not be intended that any thing more was in controversy than what is comprehended in the award.[8]

The submission was by bond conditioned to stand to the award of J. S. so that it were made "of and upon the premises;" the award referring to that clause, ordered that one of the parties should pay to the other 10*l.* two months after the award, and that on such payment each should make to the other a general release up to the time of the payment, though the release comprehended a time beyond the submission, and though it was objected that the bond or promise of submission would be released: this was held to be a good award, for by the payment of the money the submission was at an end, and every thing depending on it; and, on account of the clause of "ita quod,"

[7] Adams v. Adams, 2 Mod. 169.

[8] 6 Mod. 232.

the release should be taken to extend only to the things submitted.[9]

On a similar submission, it was awarded that the one party should pay to the other 10*l.* in satisfaction of all actions, suits, and accounts which he might have against him for any matter to the time of the award made, and that all suits then depending, or which afterwards should be depending between them, for any matter, from the beginning of the world to the time of the award made, should cease; this was held good, though it comprehended a time beyond the submission, because it must be presumed, without being shewn, that nothing had arisen between the time of the submission and the award.[1]

The submission was of all actions personal, "so that the award were made of and upon the premises," before Easter: the award, made before Easter, and professing to be made "of and upon the premises," ordered that the one should pay to the other 20*l.* at Midsummer next ensuing, and that *then* the other should release to him all actions personal, in satisfaction of all matters personal between them; this being made "of and upon the premises," it was held, that it must be intended that the release was to be of actions only till the time of the submission, and not till Midsummer.[2]

[9] Dubitatur M. 14 Car. B. R. Atnoke v. Orwell, moved in arrest of judgment and the *Postea* stay sur ceo. Rol. Arb. O. 4. Vid. acc. 2 Mod. 170.

[1] 23 Car. B. R Lerwyn v. Hills on demurrer. Rol. Arb. O. 5. S. C. Al. 26. there called Gurman v. Hill.

[2] 5 Jac. Gosse v. Brown, Rol. Arb. M. 1. Hob. 258. S. C. cited Mo. 885. pl. 1242.

So, where an award was made "of and upon the premises," that all actions and controversies between the parties should cease; it was held that, though the latter words, in strict grammatical propriety, applied to all matters and controversies at the time when they were used, that is, at the time of the award, yet the words, "of and upon the premises," should control the meaning, and refer it only to controversies at the time of the submission.[3]

There is no doubt but that at present, without the help of this controlling clause, the same construction would prevail in all cases similar to the preceding; even in those times of nicety, it was held that an award of a sum of money *now* in controversy, was good, for that it should be understood to have been in controversy at the time of the submission as well as at the time of the award.[4]

Much difficulty, it has been observed, occurs in all the more ancient reports, on the construction that ought to be put on the award of a release: that which was naturally adopted as the most probable mode of putting an end to litigation, between the contending parties, has, in almost numberless instances, been the great obstacle to the accomplishment of that purpose.—It has not been without an obstinate struggle, that an award of a "general" release, unaccompanied with any words from which an unfavourable construction might, with any shew of reason, be put

[3] Cro. El. 861. Goodman v. Fountain.

[4] Baspole v. Freeman, Cro. Jac. 285.

upon it, has been admitted to be good; though so early as the reign of Charles the second a distinction was made between the award of a "general release," without additional words, and of a "general release to the time of the award;"[5] yet, so late as the seventeenth of George the third, an objection was seriously taken to an award because it ordered a "general release." On a reference at *nisi prius* of all matters in question *in the cause*, the arbitrators had at first ordered the parties to give general mutual releases; but afterwards observing that the reference was not of *all matters between the parties*, they thought they had exceeded their authority, and therefore they made another award, in every other respect the same as the former, but instead of *general* releases, ordered special releases of matters in difference in that cause. An application was made to the court to have both awards set aside, the first because of the general releases, and the second, because it was made after the arbitrators had executed their authority. The court however held that the first award might be supported, either by construing the release to be so far good as it fell within the authority of the arbitrators, or if it must be supposed to be one intire thing, by rejecting it altogether.[6]

The leading case on this subject is that of Vanlore and Tribb, as given in Rolle's Abridgment:[7] the submission was made on the first of May, of all contro-

[5] Vasque v. Daniel, 25 Car. 2. 3 Keb. 253.

[6] Pickering v. Watson, 2 Bl. Rep. 1117. M. 17 G. 3. C. B.

[7] Rol. Arb. N. 1. Vid. Mawe v. Samuel, 2 Rol. Rep. 2, the same doctrine. Kynaston v. Jones, Rol. Arb. N. 2.

versies between the parties: the award was made on the fourth of May, and ordered that one should give a general release to the time of the award: this was held to be altogether void, because, comprehending a time out of the submission, and extending to controversies that might have arisen between the first and the fourth of May, it was void as to these, and being an intire thing it must be considered as void in the whole.

But the principal reason given by the court for this determination was, that by this release, the bond or assumpsit, by which the opposite party was bound to perform the award, would be released. And this reason has been adopted in subsequent cases.

It was awarded that the defendant should pay to the plaintiff two sums at two several days, and that several releases should be given *presently:* the court held this was void, because the release would discharge both the abitration bond and the money awarded to the plaintiff.[s] Here the court must have proceeded on the idea that the release was an intire act, and that a release to the time of the submission would not have been performance.

The submission bond was dated the 2d of July: the award was that the defendant should execute a general release to the plaintiff to the 12th of August following, and that then the plaintiff should give a general release to the defendant: to this it was objected, that as the defendant was to give the first release, if the plaintiff afterwards refused to give his in return, the defendant would have no remedy; for, if, on such refusal, the

[s] Adams v. Adams, 2 Mod. 169.

defendant should sue on the submission bond, and assign the breach in this, that the plaintiff had not executed the release on his part, he might plead the present defendant's release in bar of this action on the bond.— And here a distinction was made by Powell, J. between an award of releases generally, and an award of releases to be executed to the time of the award made:[9] in the former case, he said, the release should be understood to relate only to the time of the submission; but in the latter, such a construction could not be admitted, because, going expressly beyond the time of the submission, it would release the bond of submission itself, and all intermediate acts. But Treby, C. J. said that it had been held in such a case, that the submission bond should be excepted.[1] And it certainly had been so held, about seven years before, in the following case. To debt on a bond conditioned to perform an award, the defendant pleaded "no award." The plaintiff, in his replication, set forth an award, "that the defendant should pay 5*l.* to the plaintiff presently, and give bond for the payment of 10*l.* more on the 29th of November following, and that the parties should "now" sign general releases; on demurrer, this was argued to be a void award, because mutual releases were to be given at the time of the award, which would discharge the bond payable in November following. But the court overruled the demurrer, saying the releases should discharge such matters only as were depending at the time of the submission.[2]

[9] See this distinction 3 Lev. 344. 1 Show. 272.

[1] Marks v. Marriot, 1 Ld. Raym. 115, 116. M. 8. W. 3. M. 3 Mod. 264.

[2] Rees v. Phelps, M. 1 W. and

Chief Justice Trevor, however, afterwards[3] supported the distinction taken by Powell, saying that "to hold that a tender of a release to the time of the submission was a sufficient performance, where the arbitrators had awarded a release to the time of the award," would be to *make* an award, and not to declare the law upon it, and then farewel all awards.

It is now, however, clearly settled, that an award of releases up to the time of making the award, is not altogether void, but that it shall be construed so as to *support* the award, and that for two reasons: the first, that it shall be intended that no difference has arisen since the time of the submission, unless it be shewn specially that there has; the second, that a release to the time of the submission is a good performance of an award ordering a release to the *time* of the award; not because the meaning of the arbitrators is so, but because their meaning must be controlled so far as it is void, by construction of law.[4]

I shall conclude this part of the subject with one general observation; that though an award must possess all the qualities which have been described as necessarily belonging to it, yet the courts, in modern times, have repeatedly declared that they disapproved of the strictness with which they were formerly construed, and that they will always adopt a liberal construction, in order that awards may answer the purpose for which

[3] M. 13 W. 3. Lee v. Elkins, Mod. 590. Lutw. 545.

[4] Abrahat v. Brandon, 10 Mod. 201. Squire v. Grevill, 6 Mod. 33. 35. 2 Ld. Raym. 964, 5. Cooper v. Pierce, 1 Ld. Raym. 116. vid. 12 Mod. 116. Godb. 164, 5. 2 Keb. 431.

they are intended.[5] Lord Hardwicke too, on one occasion, declared, that as courts of law had relaxed considerably from the rigour formerly observed, it might possibly be of consequence to consider, whether courts of equity might not still take greater latitude; but he said he was unwilling to do this, because it would introduce confusion and uncertainty, rendering awards a mixed case, partly determined by arbitrators, and partly by the authority of courts of equity, and therefore he chose rather to confine himself to one rule.[6]

*When an Award, though void for part, shall be good for the rest.*

In early times, if one part of an award was void, the whole was considered as void: but in the reign of Queen Elizabeth, Holt says,[7] in the reign of King James the first, it began to be the rule of the courts, in many cases, to enforce the performance of that which, had it stood by itself, would have been good, notwithstanding another part might be bad: but the adoption of this rule without restriction, it was soon discovered, would, in many instances, be productive of injustice. It became therefore necessary to distinguish in what cases the rule should be adopted, and in what it should be rejected. The principles by which the application of the rule shall be directed are not very accurately explained in the books; but, from a general purview of the cases, I will venture to express them in general terms, and give under each the cases which seem to justify my assertions.

[5] Per Ld. Mansfield, 1 Bur. 277.

[6] Atk. 504. (519.)

[7] 12 Mod. 534.

If an award be void as to part only of what is ordered to be done by one of the parties, but good as to the rest, it is not competent to him who is ordered to perform it to object to the whole, on account of the part which is void; but he must perform the part for which the award is good, as if it stood by itself; unless the opposite party could object to the performance of *his* part, on account of the want of remedy to enforce performance of the part which is void on the other.[8]

Thus, if the submission be of a particular thing, and the award made of that which is submitted, and also of something else to be done by the same party, though with respect to the latter the award be void, yet he shall be bound to perform the rest.[9] (*n*)

As, if the submission be of all matters depending, and the award be that one of the parties shall not prosecute any action depending or arisen at the time of the award made, where there are actions depending between the time of the submission and the award, in which case the award is void as to them, yet the award being good for those which were depending at the time of the submission, must be so far performed.[1]

If it be awarded that one shall pay so much to the other, and that he shall give bond with two sureties for that sum, though this be void as to the sureties, yet he must give a bond himself.[2]

So, "that the defendant shall pay the plaintiff 150*l.* and find three sureties for the payment of a *further*

[8] Vid. Rol. Arb. N. 6.

[9] Tomkins v. Webb, 2 Rol. Rep. 46.

[1] 18 Jac. Sayer v. Sayer, Rol. Arb. N. 5.

[2] Vid. 19 E. 4. 1. 18 Ed. 4. 23. cited Cro. El. 432. Rol. Arb. N. 7. 1 Rol. Rep. 270. 2 Lev. 6. 3 Leon. 62.

(*n*) In a cause between one plaintiff and two defendants, a rule was entered to refer all matters in variance *in the cause*, &c. The referees reported a sum

sum," though void with respect to the sureties, he must pay the 150*l.* and be bound himself for the further sum, if no objection can be taken to any other part of the award.[3]

So, if it be awarded that the one shall make assurance of certain land, within the submission, to the other and his *wife*, though this be void as to the wife, who is a stranger to the submission, yet it is good for the rest, and he must convey the land to the other party himself.[4]

So, if the award be that one of the parties *and* his wife levy a fine of the land in dispute, to the other, though this be void as to the wife, yet the husband must levy a fine, otherwise he will forfeit his bond.[5]—So, if the award be that he shall make an estate of certain lands to the plaintiff for life, with remainder to a stranger in fee, this is good for the estate to the plaintiff for life, and for so much must be performed, though it be void for the rest.[6]

So, when it was held that the arbitrator had no power over the costs of the arbitration, yet "an award that one of the parties should pay a sum of money to the other, and so much for writing the award," must have been performed with respect to the money to be paid to the other party.[7]

The submission was by bond, conditioned to stand to an award of all controversies and doubts, had, made,

[3] Id.

[4] M. 37, 38 El. Samon v. Pitt, Rol. Arb. N. 8.

[5] Keilw. 43. a. b. 45 b. 2 Keb. 290.

[6] Bretton v. Pratt, Cro. El. 758, pl. 27.

[7] Perryn v. Barry, Bridgeman, 90, 91. Pinckney v. Bullock, 2 Keb. 759. 2 Lev. 3.

a sum to be due from *one* of the defendants to the plaintiff, and another sum to be due to the plaintiff from *both* defendants. The report as to the *separate* debt was set aside by the court, and the residue confirmed. *Woglam* v. *Adams & Byrne*, Supreme Court of Pennsylvania, September Term, 1804.

moved or stirred between the parties from the beginning of the world till the day of the date of the bond: it was awarded that the one should pay to the other 10*l.* which appeared by his confession to have been received by him; and if it should appear in a month, and due proof should be made that he had received more than he had confessed, then he should pay that also.—It was objected that all doubts were referred, and the condition contained a proviso that the award should be made of the premises, yet the arbitrators had not made an end of all doubts, as it appeared they doubted whether more was due or not: but the court held, that as it was not averred that there was any doubt moved or stirred between the parties at the time of the submission, it should be presumed that this doubt arose in the minds of the arbitrators *after* the submission, and that they added this reservation only by way of greater caution on their own part: and though such a reservation was void, yet the award was good for the payment of the 10*l.*[s]

If that part of the award which is void be so connected with the rest as to affect the justice of the case between the parties, the award is void for the whole. Thus, where it was awarded "that the defendant should pay to the plaintiff 40*l.* by instalments, namely, 10*l.* at Michaelmas, 20*l.* at Christmas, and 10*l.* at the Annunciation; and, if before the last payment it should seem to the arbitrator that the defendant was engaged for the plaintiff in any debt not satisfied, he should re-

[s] Jeanes v. Fourthe on a writ of error from C. B. and judgment affirmed in B. R. H. 10 Car. Rol. Arb. M. 6.

pay him so much as the debt not satisfied amounted to; and that the parties should give mutual releases;" it was held, that that part with respect to the reimbursement being void, and affecting the whole of the award, the whole was void.[9]

I have ventured to assert that it is not necessary that an award should be mutual, in the sense in which the rule is expressed, and in which it is commonly understood, namely, that something must be awarded in favour of each party: however, when from the tenor of the award it appears that the arbitrator has intended that his award should be mutual, awarding something in favour of one of the parties as an equivalent for what he has awarded in favour of the other: if then by any of the rules for the constitution of an award, that which is awarded on one side be void, so that performance of it cannot be enforced, the award is void for the whole, because that mutuality, which the arbitrator intended, cannot be preserved.

Thus, where the dispute related to the title of a copyhold tenement, and it was awarded that the defendant should pay 6*l.* to the plaintiff on the twenty-first of May, and that then the plaintiff should release all his right to the copyhold, and three months after the aforesaid first of May should make further assurance to the defendant; at a time when the courts would not supply the word "twenty," but for want of it held all that part of the award to be void; it was perfectly consonant to reason and justice that they should hold the award void for the whole, and not force the defendant

[9] Winch and Grave v. Saunders, Cro. Jac. 584.

to pay the 6*l.* when he could not have that in return which was intended by the arbitrator as a consideration for it.[1]

So, when it was held that the arbitrator had no power over the costs of the reference, if it had been awarded that one of the parties should pay the other 10*l.* and that the latter should pay the costs of reference; the latter part being void, and intended as a recompence or equivalent for the other, it was reasonable to consider the whole award as void.[2]

So, where A. and B. submitted, to certain arbitrators, the title of certain land, who awarded that all controversies should cease concerning the land, and that B. should pay to A. 8*l.* and that A. his wife and son and heir apparent, by the procurement of A. should pass to B. such assurance of the land as B. should require; this was held to be void for the whole; A. could not compel his wife and son, who were strangers to the submission, to make the assurance, and perhaps the wife and son had the estate of the land in them, and their passing the estate was the consideration for which the 8*l.* were awarded to be paid by B. to A.[3]

It was awarded that the defendant should pay and satisfy the plaintiff for task work, and days work done by the latter for the former, and that then the plaintiff should pay to the defendant 25*l.* and give him a general release of all controversies: this was held to be void

[1] Yel. 98. Markham v. Jennings, Rol. Arb. K. 15. Brownl. 92.

[2] Rol. Arb. K. 13. 14. Cro. Jac. 577, 8. Al. 10. 10 Mod. 201.

[3] Barney v. Faierchilde, Rol. Arb. N. 9.

for the whole, because being void for that awarded to be done by the defendant on account of the uncertainty of how much he has to pay to the plaintiff for the task work and days work, the recompence intended for the plaintiff was gone.[4]

If one intire act awarded to be done on one side comprehend several things, for some of which it would be good, and for others not, the award is bad for the whole, because the act cannot be divided.—As if an aggregate sum be awarded to be paid to one of the parties for considerations expressed in the award, some of which are within the submission, and others out of it, this is void for the whole, because it is impossible to distinguish how much was intended for the considerations within the submissions.—Thus, where the submission was of all controversies between the plaintiff and defendant, and the wife of the latter, for divers sums of money laid out for the wife by the plaintiff at her *request* when she was sole: an award "that the defendant should pay to the plaintiff a certain sum of money, for all sums laid out by him for the wife while sole, without the addition of its being at her *request*," was held void, in those times when the courts were unwilling to presume any thing in favour of an award, and therefore would not take it for granted that the whole was laid out at the request of the wife: and in this case, had any thing been awarded on the other side, the award would have been totally void, because it would have wanted that mutuality which the arbitrators had intended to prevail in their award.[5]

[4] 2 Saund. 293.

[5] Waters v. Bridges, adjudged on a writ of error. Cro. Jac. 639.

When it was held that a release extending to a time beyond the submission, was void for the whole, and that the execution of a release to the time of the submission was not a good performance of an award which ordered a release to the time of the award; and when it was held that, without a release, no satisfaction could be presumed, unless some words were used which necessarily implied a satisfaction: in those times, if money had been ordered to be paid, and then a release from the other to a time beyond the submission, the latter part being void, the whole award would have been void.[6]—This is the doctrine of Rolle in his abridgment of the case of Vanlore and Tribb, from his own reports; and from this case, as given in the abridgment, all the difficulties with respect to releases have arisen.

The case, as given in his reports, by no means justifies his conclusion here: in these the award is stated to have been, "that one of the parties should pay so much to the other in satisfaction of all duties which "he" (the latter as it would seem) had against "him" (the former apparently) as administrator to J. S. and that "he" (it appears doubtful which of the two is here meant) should make a release to "him" (here the same doubt prevails) of all actions to the day of the award:" the breach assigned was the nonpayment of the money, and the question was, whether, as the award was confessedly void as to the release, "he" should be bound to perform the remainder, that is, to

[6] Vanlore v. Tribb, Rol. Arb. N. 1. cites his own reports.

pay the money.—The doubt with respect to the award as here stated is whether from the confusion of the pronouns we are to understand that the release was to be given by the same person who was to pay the money, or by the other to him in consequence of the payment; if we are to understand the former to have been the case, as seems necessarily to be implied from the manner of reasoning both of the court and counsel, there could be no question but he was bound to pay the money, for that was altogether independent of the release.—It is laid down as a principle in the argument of the counsel, that as the party is bound to perform every thing in the award, therefore he ought to perform that which is good, though part be void; this is adopted by the court, and judgment given accordingly for the plaintiff.[7] Had the release been awarded to be given by the other party on payment of the money to him, then the question could not have been directly whether he who was to pay the money was bound to perform his part of the award; but that would have depended ultimately on the question with respect to the release itself; and according to the principles which then prevailed, the award with respect to the release would have been considered as void, and therefore, that being the recompence for the payment of the money, the award would have been of one side only, and therefore void for the whole, according to the doctrine of the abridgment.

The next case in the abridgment, is one of a submission on the first of May of all matters between the

[7] 1 Rol. Rep. 437. S. C. Bridgeman, 59.

parties, and an award that the one should pay to the other 20*s*. in satisfaction of all matters between them to the time of making the award, which was on the fourth of May.—Though this comprehends more time than the submission, says the abridgment, stating the words of the court, yet because it shall not be intended that there were any matters between them, from the time of the submission to that of the award, if it be not shewn on the other side, the award is good.[8] Rolle adds his own opinion, that this case seems to be good law, but that the reason on which the court relies, is not the true reason, because it *crosses* the reason given for the judgment in the case before; for there the award was held to be void, because there *might* have been other disputes between the time of the submission and the award: but he says, it seems the reason of the present case is, that though there *were* other matters between the submission and the award, and so the award void for these, yet here there is not one intire act to be done, as in the case before of the release; but the 20*s*. shall continue a good satisfaction for the other matters submitted; and all the inconvenience is that perhaps the money to be paid was increased by reason of the intervening matters, and so he may sustain some prejudice, but no prejudice can be sustained on the other side.—The reason of the court, however, is more consonant to the principles of justice than that of Rolle—by presuming that there were no matters between the parties, from the time of the submission to

[8] M. 24 Car. B. R. Kynaston v. Jones, H. 15 Jac. Ley v. Payne, Hutt. 9. Mo. 885. pl. 1242.

that of the making of the award, the court suppose that the arbitrator had not in contemplation any injury for which he was to give a satisfaction, but those which were within the submission, and that the words seeming to comprehend something more, must be considered only as an inaccurate expression.—But the reason suggested by Rolle, is against the justice of the case; for if in truth the arbitrator, by considering other injuries than those submitted to him, had increased the satisfaction, beyond that which he would otherwise have given; and if the party notwithstanding that increase of damages, be not precluded from suing his opponent for those injuries which were out of the submission, the intention of the arbitrator does not prevail.

It is only by supposing that the arbitrators have not expressed their real meaning with perfect accuracy, that the following and many other similar cases can be supported, with a due regard to justice.

The submission was by A. and B. of all suits between them, concerning certain tythes; the award was that A. should pay to B. a certain sum of money, and that B. should suffer all suits which he had against A. to be discontinued, when in fact he had other actions against A. which did not concern the tythes: the court held that the award, though void as to the discontinuance of the actions which did not concern the tythes, was yet good for the rest, "because the suffering, says Rolle, of the actions to discontinue, is not an intire act like the execution of a release."[9] But the only fair

[9] Tr. 18 Jac. B. R. Ingram v. Rep. 162. Cro. Jac. 663, 664. Webb, Rol. Arb. N. 4. 2 Rol. Palm. 107.

reason must be that the arbitrator had no other actions in contemplation than those concerning the tythes.

It is indeed laid down by Lord Coke, in general, unequivocal terms, "that though several things be awarded to be done in satisfaction of another, and some are within the submission, and some out of it and therefore void; and although all were intended by the arbitrators to be a plenary and intire recompence for the things done by the other, yet if any thing to be given or done to the party, though of small value, be within the submission, the award is good, though it appear to have been the intent of the arbitrators, that that which is within the submission, without the rest, should not be a plenary satisfaction for the thing to be done by the other party.[1]—But Justice Powell mentions this opinion of Lord Coke in terms of disapprobation, and says, that the judgment in the case which Coke had then in contemplation was afterwards reversed on a writ of error.[2] It well deserved his disapprobation; for if it were to prevail, the inadvertence or the blunder of an illiterate arbitrator might in many instances be converted into an instrument of the grossest injustice.

However, when it appears that both parties have the full effect of what was intended them by the arbitrator, though something be awarded which is void; yet the award shall stand for the rest.

Thus, if it be awarded that the one shall pay the other 40*s*. in satisfaction of all matters between them, and that the latter shall give the former a release of all

[1] 10 Co. 131. b. 132. b. Rol. Arb. b. 22.

[2] 1 Leon. 170. Vid. 12 Mod. 587.

matters up to the time of the award, though the award be void as to the release, yet it shall stand as to the rest, because without the release, the mutuality intended by the arbitrator remains complete.[3]

So, an award, "that the plaintiff shall have and enjoy a certain horse which was in controversy between the parties, and that the defendant should pay him 3*l.* before Michaelmas, towards his charges, and that they shall release the one to the other all matters whatsoever, between the time of the award made and St. Michael," though void as to the release, would now be considered as valid for the rest.[4]

So, an award "to pay 10*l.* in satisfaction of trespasses, and that both parties shall give mutual releases to the time of the award," is good as to the 10*l.* because, by being in satisfaction of the trespass, the mutuality is complete without the release.[5]

The submission was by bond in the penalty of 2000*l.* the bond of the plaintiffs was dated on the twenty-second of February, that of the defendant on the ninth of March; the award ordered that the defendant should pay to the plaintiffs 1200*l.* at four payments; that on the fourth of May he should enter into four bonds for the payment on the days appointed, and should then pay to the plaintiffs 30*l.* towards their costs and charges expended; that all actions and controversies between the plaintiffs and the defendant should cease and determine; and that they should seal and deliver to each

[3] Rol. Arb. M. 4. K. 9. v. Wild, Cro. Jac. 352, 353.
[4] Held contra formerly. Stain
[5] Freem. 265.

other general releases of all controversies, suits, and demands, to the eighth day of March.—The objection made to this award was that the releases being ordered to the eighth of March, the plaintiff's bond of submission, which was dated on the twenty-second of February preceding, would be discharged by the defendant's release: but in this case the court thought that the question, whether the award as to the releases was void, was immaterial; because, it being awarded that all suits should cease, the award was reciprocal, and a sufficient satisfaction for the money ordered to be paid by the defendant.[6]

It was awarded that the plaintiff should pay 30*l.* to the defendant, and that the latter, on the payment, should surrender to the former the possession of a house in which the defendant lived, and deliver to the plaintiff a deed, by which the house was intailed to the plaintiff, and deliver up all bonds which he had against him, and execute a general release to him, to the 12th of August, the submission bond being dated the 2d of July preceding, and that the plaintiff should then give a general release to the defendant.—It was objected that the award was not mutual, because the defendant being ordered to give his release first, the plaintiff might refuse to give that awarded on his part, and the defendant had no remedy to enforce it; because if he brought an action on the submission bond, the plaintiff might plead the defendant's release in bar: but it was held that whatever might be the effect of

[6] Kynaston and Spencer v. Jones, Al. 87. Rol. Arb. N. 5.

such a plea, the award was mutual without the releases, and no defect with respect to them should vitiate it.[7]

An award consisted of the following distinct particulars. 1. That the defendant should pay all his own costs till the day of the submission. 2. That he should execute a general release to the plaintiff, of all actions, &c. unto or upon the same day. 3. That he should deliver to the plaintiff all the deeds mentioned in the award relating to the premises in dispute. 4. If he did not deliver them, then he should pay to the plaintiff *50l.* 5. That the defendant should procure double sixpenny stamps to certain indentures relating to the premises. 6. That the defendant should pay to the plaintiff 11*l.* for the costs in the suit recited in the award, on or before the second day of May following, and give a bond in the penalty of 74*l.* with a condition to pay the said 11*l.* and that the plaintiff on the performance thereof should execute a release to the defendant of all actions unto or upon the day of the submission.

Though the opinion of the greater part of the court was that the release to be made by the plaintiff to the defendant, would, if executed, have been a release to the submission bond; yet they were all of opinion that the award was good, because it amounted to a particular satisfaction, and mutual recompence as to each particular matter awarded.[8]

By an umpirage, it was ordered that all actions should cease. 2. That the defendant should pay to

[7] Marks v. Marriot, 1 Ld. Raym, 114, 5, 6.

[8] Lee v. Elkin, 13 W. 3. C. B. Lutw. 545.

*the plaintiff 12l. 15s. 3d.* 3, That the defendant should deliver to the plaintiff certain goods particularly mentioned, and three boxes, and several books, without naming them; and that the plaintiff should deliver to the defendant several articles by name; but that, if any of the goods should be mislaid or lost, then the parties should pay the value of them, to be appraised by the umpire and the arbitrators, and that the parties should execute mutual releases. In an action on the bond for performing this award, the breach was assigned in the nonpayment of the 12*l.* 15*s.* 3*d.*

That part of the award, respecting the three boxes and *several* books, was held to be void, as it clearly is, on account of the uncertainty as to the books; as to that part which relates to the appraisement of the goods, that might be mislaid or lost, by the umpire and arbitrators, doubts were entertained; some[9] holding that it was a judicial act, Powell that it was a ministerial act.—With respect to the releases awarded to be executed on both sides, it was resolved, that, although no time was limited for the execution, nor was it said, that it should be done, on or after the performance of the other parts of the award; yet the award being void, with respect to the delivery of the goods, neither the one nor the other was obliged to give the release, for then the goods would be released without any satisfaction, which, as was said by one of the judges, would be absurd.

It was also held, that the submission in this case containing the provisional clause of "Ita quod," if the

[9] Trevor, C. J. and Blencow, J.

award was void for a part, it was void for the whole; and being void for that part relating to the delivery of the goods, it was void for the whole.[1]

The proper way, however, of considering the case, seems to be this: that part of the award which gives 12*l.* 15*s.* 3*d.* to the plaintiff, and orders the delivery to the plaintiff of certain goods particularly mentioned, and three boxes, with several books, without particularising them, is altogether the consideration intended by the umpire for the delivery of the goods by the plaintiff to the defendant, and part of that consideration being void, the plaintiff could not be compelled to perform his part; consequently if the defendant had been held to the payment of the 12*l.* 15*s.* 3*d.* he could not have had that equivalent which the arbitrator intended him. But had the plaintiff alleged that he had delivered the goods awarded to be delivered on his part, it is conceived, no objection could have arisen on the part of the defendant on account of the releases, because without them the award would then, in every respect, have been mutual.

In all the cases in which objections are made to the award, as wanting mutuality, on account of one part being void, the arguments are founded on the supposition that the defendant, on performance of his part, has no means of enforcing performance from the plaintiff of the part awarded to be performed by him in return; this strongly favours the argument, that where that objection is removed by an actual previous performance on the part of the plaintiff, the defendant

[1] Cockson v. Ogle, 13 W. 3. Lutw. 550.

shall be bound to perform his, where there is no reason to impeach the validity of that.—This opinion is confirmed by the reasoning of the judges in the case of Lee and Elkins.[2]—Powel, J. says there is a diversity to be observed; where an award consists of several things, for one of which it is void, and it is expressly said, that on performance of that which is void, the other party shall do some particular thing, there the performance of that, for which the award is void, is a condition precedent, and must be averred before the action against the other for not doing his part, can be maintained.—But when there are several things in an award, for some of which it is good, and for others not, and it is further said, that on performance of the premises, the other party shall do something in return, there the words "on performance of the premises," shall only apply to that part of the award which is good, and performance of so much obliges the other to do what belonged to him. And, in the latter case, the opinion of Lord Hale seems to have been conformable to that of Powell. The award was that the defendant should pay to the plaintiff 10*l.* and that the plaintiff should pay to the defendant the expences to the making of the award, and that *then*, each should give to the other a mutual release; the breach being assigned in the nonpayment of the 10*l.* by the defendant, it was objected that the award was not mutual, because it was void for the expences to be paid by the plaintiff, and therefore no release was ever to be given; but Hale held that on performance of that, for which the award

[2] 12 Mod. 588.

was good, the release ought to be given.[3]—But this distinction was, on good reason, denied by Chief Justice Trevor, who said, that in the latter case mentioned by Powell, as well as in the former, if it appeared that the arbitrators designed that such illegal part should be part of the consideration, in respect of which the other was to perform, that illegal part must in fact be performed, otherwise the opposite party would not have that advantage which was designed for him; and he would be injured by being forced to pay for a consideration, of which he had not the benefit.—Thus, if several things were awarded to be done on the part of the defendant, against which no objection could be taken, and also that he should give the plaintiff a general release, "unto and upon the day of the arbitration bond," and that then the plaintiff should give *him* a like general release; though, by the Chief Justice, it was held that the release was void, as extending to the *day* of the submission, and so going beyond the submission, yet he held that the plaintiff was not bound to give the release on his part, independently of the same objection to its legallity, unless the defendant first gave *his* release; but if the plaintiff averred performance on his own part, the defendant could not excuse himself from the performance of what was awarded to be done by him, merely on account of the illegality of the part to be performed by the plaintiff.

*The Form of the Award.*

Where the submission is verbal, without a proviso that the award should be made in writing, a verbal award is sufficient.[4]

[3] Pinkney v. Hall, 1 Lev. 3. 23 Car. 2.

[4] Cable v. Rogers, 3 Bulstr. 312.

If the submission be by bond, and the condition contain a proviso that the award shall be made and ready to be delivered, either in writing or by word of mouth; a parol award is in this case also sufficient.[5] And where the proviso is merely that the award shall be made and delivered, it seems that it may be made without writing;[6] at least it is not necessary for the plaintiff to shew that it was in writing.—If the proviso be that the award be made in writing or by word of mouth before two witnesses, a verbal award alone will not satisfy the proviso, it must also be pronounced before two witnesses.[7]

If the proviso be that the award shall be made and delivered under the hands and seals of the arbitrators, the award must be actually subscribed by them; sealing alone will not be sufficient.[8] But if the arbitrator make his mark, that is sufficient subscription.[9]

And if the proviso be that the award shall be sealed with the seal of the arbitrator before a certain day, it will not be sufficient for the party pleading the award, to allege that he has it in court sealed with the seal of the arbitrators, he must shew that it was sealed at the time of the delivery.[1]—But though, in the beginning of the replication, it be only said, that the arbitrators, by their writing sealed with their seals, awarded; yet if it be afterwards said, that it was ready

[5] Hanson v. Liversedge, 2 Vent. 240, 242.

[6] Rous v. Nun, 1 Sid. 155. vid. ante 116, 117 acc.

[7] Wilson v. Constable, Lutw. 536.

[8] Thaire v. Thaire, Palm. 109, 112, 121.

[9] 3 Salk. 44.

[1] Palm. 121. Jenkinson v. Allenson, 3 Keb. 513.

to be delivered under their hands and seals, it will be sufficient to satisfy the proviso.[2]

It was formerly held that a proviso "that the award should be made by deed indented," was not satisfied by an award made in writing without being indented, and that even the acceptance of it by the parties unindented, would not alter the case.[3]—It was further held that an averment "that it was made according to the effect and form of the condition would not aid it, because that relates to the delivery to the parties, and *so*, it is said, *it hath been often adjudged.*[4] But the good sense of later times, has considered this objection as altogether immaterial, and of not more consequence than if the submission required the award to be made on gilt paper.[5]

Where there is a proviso that the award be made, "of and upon the premises," it is not necessary that the award should expressly purport to be made "of and upon the premises," for unless the contrary appear on the face of it, it cannot otherwise be intended.—This, at least, seems the true conclusion from two cases reported; where the submission contained that proviso, and if the arbitrators did not make their award within the time, then an umpire should decide; the arbitrators did not make any award within the time, but the umpire did without professing to make it "of and upon the premises:" it was held that the proviso ex-

[2] Lambard v. Kingsford, Hinton v. Cray, 3 Keb. 512. Lutw. 558.

[3] Dict. per Hale in Elborough v. Yates, 3 Keb. 125. adj. in 467.

[4] Burges v. Pleyer, Freem.

[5] Barnes 56.

tended to the umpire, as well as to the arbitrators; but that though he had not professed to make his award "of and upon the premises," it was sufficient.[6]

*Performance what shall be*

It is not in all cases absolutely necessary that performance should be exactly according to the words of the award; if it be substantially and effectually conformable, it is sufficient. Thus, if it be awarded that one of the parties should deliver, to the other, the last will and testament of his testator, it is sufficient to allege a delivery of letters testamentary, because these are in effect the same thing.[7] Where it was awarded that one of the parties should "withdraw" his action, it was much debated whether his suffering a discontinuance would satisfy the award: the report of the case is far from being clear,[8] but the prevailing opinion seems to have been that it should not; for by this award, it was said, the party must do an act; he must come into court before the day which was given for the continuance, or before the return of the writ, and say that he will no further proceed in his action, on which the entry on the record is, "that the plaintiff comes in his proper person and says that he will no further proceed in this plea."

A discontinuance, however, seems a sufficient performance of such an award, because it has the same effect as a retraxit; for though a retraxit be a bar to another action, which a discontinuance is not, yet by bringing another action after an award of a discontinuance, the party as much disobeys the award, as if he did the same after an award of a retraxit.

[6] 1 Keb. 790. 865. Bulstr. 67.

[7] 17 Ed. 4. 3. cited 3

[8] 21 Ed. 4. 38, et seq.

Where the award orders a release to a time beyond the submission, a release to the time of the submission is sufficient performance.[9]

Performance by the attorney is equivalent to performance by the principal; as if the award be that the party shall discontinue his suit, a discontinuance by his attorney is sufficient.[1]

If it be awarded that one of the parties shall pay a sum of money to a stranger and his assigns before a certain day, and before the day, the stranger die, the party must pay the money to the executor or administrator; for these are the assignees in law; and the law is the same, where no mention is made of assigns, in the award.[2]

Where the concurrence and presence of both parties is not absolutely necessary to the performance, each ought to perform his part without request from the other. Thus, where the award was, that the defendant should reassign to the plaintiff certain premises mortgaged to him by the latter, it was held, he was bound to reassign without the presence or concurrence of the plaintiff, and if the mortgage had been of a fee, the reassignment might be done by lease and release. Had the award been that he should reinfeoff the plaintiff, he

[9] Godb. 164, 5. 1 Sid. 365. 6 Mod. 34, 35. 12 Mod. 8, 117, 589. et vid. ante page

[1] Jenk. 136. dict. contra of a retraxit.

[2] 3 Leon. 212.

[3] Nihil aliud esse, sententiæ stare, quam id agere, quantum in ipso sit, ut arbitri pareatur sententiæ. Ff. l. 4. t. 8. s. 23. n. 2.

could not have performed it without the presence of the plaintiff or some one on his behalf to take livery.[4]

Where an act is awarded which may be done two ways, but by the one, it cannot by law be done before a distant day, and by the other it may be done immediately, the party must do it in that way in which he may do it immediately, unless he has a time by the award, which goes beyond the distant day. Thus where the award was that one of the parties should grant the reversion of an estate held for term of life, this, before the statute for the amendment of the law, might have been done in two ways; by fine, or by deed, and attornment of the tenant for life, but the fine could not be levied before term, the reversion must therefore have been granted by deed, which might be done immediately; however, it must be observed, that, before that statute, the conveyance would not have been complete without the attornment of the tenant, which could not be compelled but by "per quæ servitia," or "quem redditum reddat;" and these could not be prosecuted with effect till the term: if, therefore, the party could not have completed the conveyance before term, he could not have been guilty of a breach of the award.[5]

It may sometimes be a question, when mutual things are awarded, who shall do the first act. On a submission of a battery committed by one of the parties against the other, if it be awarded that the offender shall pay a sum of money, and the other give him a

[4] Rosse v. Hodges, 1 Ld. Raym. 233, 234.

[5] 21 Ed. 4. 40—43. quære, for the report is very inaccurate.

release of all actions, or a release simply, there the payment of the money must precede the release, because, according to the old doctrine, such a release would have extended to the money awarded in satisfaction. But if the award be that the one shall pay money, and the other give him a release of "the" action, this not extending to discharge the payment of the money, and the remedy on the award remaining for the recovery of it, after the execution of the release, there is no precedency required, and the offender may sue on the award, and assign a breach in not executing the release without shewing that he has paid the money, nor will he be barred, by the other party's alleging the nonpayment, in his plea.[6]

If the party, in whose favour the award is made, accept of a performance differing in circumstances from the exact letter of the award, that is sufficient:—thus, if it be awarded that the one shall infeoff the other in a piece of land, and the latter come to him and require him to infeoff J. N. and himself, to the use of him and his heirs; if he make the feoffment accordingly, this is performance of the award, sufficiently within the intent, though not exactly within the words. So, if the award be, that the defendant shall conduct the servant of the plaintiff to London, and the defendant, by the direction of the plaintiff, deliver him to A. B. at Salisbury to be conducted to London, this is sufficient. But where the submission bond was to a stranger, and

[6] Bilford v. Flint, 2 Bulstr. Keb. 608. Sir T. Raym. 169. 117. vid. 2 Keb. 163. 403. 3 [7] 36 H. 6. cited 3 Bulstr. 67.

the plaintiff 12*l.* 15*s.* 3*d.* 3, That the defendant should deliver to the plaintiff certain goods particularly mentioned, and three boxes, and several books, without naming them; and that the plaintiff should deliver to the defendant several articles by name; but that, if any of the goods should be mislaid or lost, then the parties should pay the value of them, to be appraised by the umpire and the arbitrators, and that the parties should execute mutual releases. In an action on the bond for performing this award, the breach was assigned in the nonpayment of the 12*l.* 15*s.* 3*d.*

That part of the award, respecting the three boxes and *several* books, was held to be void, as it clearly is, on account of the uncertainty as to the books; as to that part which relates to the appraisement of the goods, that might be mislaid or lost, by the umpire and arbitrators, doubts were entertained; some[9] holding that it was a judicial act, Powell that it was a ministerial act.—With respect to the releases awarded to be executed on both sides, it was resolved, that, although no time was limited for the execution, nor was it said, that it should be done, on or after the performance of the other parts of the award; yet the award being void, with respect to the delivery of the goods, neither the one nor the other was obliged to give the release, for then the goods would be released without any satisfaction, which, as was said by one of the judges, would be absurd.

It was also held, that the submission in this case containing the provisional clause of "Ita quod," if the

[9] Trevor, C. J. and Blencow, J.

award was void for a part, it was void for the whole; and being void for that part relating to the delivery of the goods, it was void for the whole.[1]

The proper way, however, of considering the case, seems to be this: that part of the award which gives 12*l.* 15*s.* 3*d.* to the plaintiff, and orders the delivery to the plaintiff of certain goods particularly mentioned, and three boxes, with several books, without particularising them, is altogether the consideration intended by the umpire for the delivery of the goods by the plaintiff to the defendant, and part of that consideration being void, the plaintiff could not be compelled to perform his part; consequently if the defendant had been held to the payment of the 12*l.* 15*s.* 3*d.* he could not have had that equivalent which the arbitrator intended him. But had the plaintiff alleged that he had delivered the goods awarded to be delivered on his part, it is conceived, no objection could have arisen on the part of the defendant on account of the releases, because without them the award would then, in every respect, have been mutual.

In all the cases in which objections are made to the award, as wanting mutuality, on account of one part being void, the arguments are founded on the supposition that the defendant, on performance of his part, has no means of enforcing performance from the plaintiff of the part awarded to be performed by him in return; this strongly favours the argument, that where that objection is removed by an actual previous performance on the part of the plaintiff, the defendant

[1] Cockson v. Ogle, 13 W. 3. Lutw. 550.

A considerable number of years having elapsed since the making of the award, is no objection to the parties being called upon to perform it.

A testator left his son and brother executors; the testator was possessed of a considerable personal estate: the brother possessed himself of it, promising to give a just account, and that the son should have his share of it; but disputes arising between them, these were referred to arbitrators, and mutual bonds given to stand to the award: The arbitrators awarded that the personal estate should be equally divided between them, and that each should give the other a general release. The brother having the greatest part of the estate in his hands, promised to share it with the son, according to the award; the son relying on that promise, gave his uncle a general release, and wishing to have his share, to enable him to discharge some debts which he had contracted, applied to his uncle, who pretending that he had not money, borrowed 200*l.* of one Hody, and 300*l.* of one Holland, for which he gave his bond, and advanced 30*l.* of his own money, and took a mortgage from the son as a security for the payment of the 530*l.*—The son could never bring his uncle to account, and to divide the testator's estate according to the award.—When the son tendered to his uncle the 530*l.* with intention to have his mortgage delivered up, the latter declared that on a just and fair account there would be nothing due, and that therefore he should have his mortgage delivered up to be cancelled.—The brother made his will, appointing his wife executrix, and died. The widow proved the will, and the son exhibited his bill against her, praying that he might have his share of his father's estate as awarded

to him: the defendant confessed the charge in the bill, but said she believed her husband had performed the award, and insisted that she ought not, either as executrix of her husband, or otherwise, to be drawn into account; for that her husband lived twelve years after the award made: and said, that though Hody's debt was paid, yet she had been sued for Holland's, and had paid it, and that on payment of that and other sums expended by her, she was willing to assign the mortgage.

The court decreed an account and distribution of what was awarded, as well as a redemption of the mortgage, but that the account of the mortgage should be taken apart and not attend the account on the award.—That the master should compute what money was due to the defendant, and on payment of that she should reconvey the mortgaged premises to the plaintiff. That the master should inquire whether the award had been performed by the brother, and if it had not, then that the defendant should be answerable in such manner as the master should appoint.[6]

*What shall be a Breach of the Award.*

If the arbitrators award that a suit depending in Chancery between the parties, shall cease; it is no breach if the plaintiff in the bill file another in the same cause, if he do not sue out process on it; for it is said, till process be sued out, a suit is not properly depending, and till that time the defendant cannot be said to be molested: that this resembles the case of a counterbond from the principal obligor in an original bond to save his surety harmless; where, though the original bond be forfeited, yet this in itself is no damnification, and the counterbond is

[6] Sweet v. Hole, Ca. Temp. Finch, 384.

not forfeited till some actual damage happen to the surety.[7]

If an award order that the defendant shall reassign to the plaintiff certain mortgaged premises, it will be a breach if he do not reassign without request.[8]

An award that all suits shall cease between A. and B. does not extend to suits, between A. on one side, and B. and a third person on the other, and consequently the prosecution of a suit between such parties is not a breach of the award.[9]

A continuance from term to term is no breach of an award that the plaintiff in an action shall not prosecute or proceed during the same term.[1]

It was awarded that the defendant should pay to the plaintiff 8l. or 3l. and costs of suit in an action of trespass between the plaintiff and defendant, as should appear by a note under the attorney's hand, "at the pleasure of the defendant."—The question was whether the defendant was bound to procure the note of the attorney, and to make his election, or the plaintiff was bound to tender him the note, before he could bring his action and assign a breach in the nonpayment of the one or the other. This question, it was argued, depended on another, which was this; whether, in the present case, the attorney was to be considered as a stranger to the plaintiff; for if he was, it was not incumbent on the plaintiff to give notice to the de-

[7] Freeman v. Sheene, 2 Bulstr. 98. 1 Rol. Rep. 7, 8. Cro. Jac. 340. Brownl. 122.

[8] 1 Ld. Raym. 234.

[9] Barnardiston v. Fowlyer, 10 Mod. 204, 5.

[1] Gray v. Gray, Cro. Jac. 525.

fendant of the sum due by the note, but the latter was, at his peril, to procure it from the attorney; but, if the attorney was to be considered as the servant of the plaintiff, and it was in his power to compel him to deliver the note, then the defendant was not bound to make his election till that was delivered to him.—The judges were at a loss how to determine, and the court not being full, the question was adjourned.—But afterwards the subject was resumed, and judgment given in favour of the plaintiff, on the principle, that, though the attorney is to many purposes the servant of the principal, yet in the case before the court, it did not lie in the knowledge of the plaintiff, to what the sum amounted, and he could not compel the attorney to make the note.[2] But this judgment is open to some observation.—Must not the attorney be considered as the agent of the plaintiff? and, if he had refused to make the note, at his request, might he not have been compelled, by an application to the court for that purpose?

If, by an award made in the middle of a term, it be ordered that one of the parties shall cease a certain suit which he has against the other; it may appear trifling to lay it down, as an important point, that it will be a breach in the plaintiff in the suit to prosecute it to judgment afterwards in the same term: but it was, in truth, seriously argued that this was no breach of such an award; because, by fiction of law, the judgment relates to the first day of the term, and therefore the award being made in the middle of the term, was of a

[2] March. 109. 157.

thing which it was impossible for the party to perform; the suit having ceased by the judgment, by relation, before the award was made.—And such is the imbecility of the human mind, when its views are contracted by the technical dogmas of a single science, that the judges, instead of rejecting this as mere jargon and absurd nonsense, very gravely observed, that though, by fiction of law, every judgment related to the first day of the term, yet as the plaintiff had in his declaration expressly averred that the defendant, after the time of the award made, had continued to prosecute his suit to judgment, and though it appeared to be of the same term, yet the defendant ought to have taken advantage of it, by special demurrer.[3]

If an award be that the one shall make a lease for a term of years to the other rendering rent, and the lease be accordingly made, and the tenant do not afterwards pay the rent, this is no breach of the award on the part of the tenant, nor is his submission bond forfeited; the remedy of the lessor for his rent is the same as in every other case of landlord and tenant: the award was completely performed by his acceptance of the lease with the rent reserved.[4]

So, if it be awarded that the defendant enter into a bond for the payment of money to the plaintiff at a future day; if he give the bond, that is performance of the award, and by nonpayment at the day, he will forfeit only the bond awarded, not the bond of submission.[5]

[3] Huys v. Wright, 1 Jac. Yelverton 35.

[4] Benl. 15. pl. 16. 27 Hen. 8. More. 3. pl. 8. there said to be 28 Hen. 8.

[5] Str. 903. 1 Barnard. 463.

So, in the case of an award to give a note for the payment of money, the giving of the note accordingly will be performance, and the plaintiff must on non-payment be confined to his action on the note.[6]

If an award be made between the grantee of a rent and the terre-tenant of the land out of which the rent issues, "that the grantor shall stand acquitted of the rent," the grantee is not bound by this to give the tenant a release; it is sufficient if he never pursue any remedy for the recovery of the rent, by action or distress.[7]

[6] Booth v. Garnett, Str. 1082. [7] 2 Bulstr. 96.

## CHAPTER VI.

### THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD OR UMPIRAGE IS PROPERLY MADE.

IN the Roman law, the only remedy which either party could have against the other for disobedience of the award was to sue for the penalty expressed in the submission.[8] But with us the remedy is various, according to the various *forms* of the submission.

Though the submission be verbal, it has been seen,[9] that in all cases an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by slow degrees that it was held that the act of submission implied in itself a promise to perform the award; before the courts went so far, they held that the promise was collateral to the submission, and that where it was laid to have been made at the *same time* with the submission, proof of the latter might have been considered by the jury as a foundation for presuming the former: but if the promise had been laid to have been made at any other time, though on the same day with the submis-

[8] Vid. p. 8. 9.

[9] P. 11.

sion, then in an action on the case, proof must have been given of an actual promise.[1]

Where the award, on a parol submission, is for the payment of money, the action on the award may be an action of debt, as well as where the submission is by deed, and as well where the award is verbal, as where it is in writing.[2] It may also be an action of *assumpsit:* in all other cases on a parol submission, an *assumpsit* is the only species of action that will lie.

When the courts would not support an action on an award of a collateral thing, where the submission was verbal, unless there were actually mutual promises to stand to the award, on consideration of a certain specific sum, it was, of course, necessary that the declaration should run in some such form as this: "Whereas certain differences subsisted between the plaintiff and the defendant, and they had submitted themselves to the award of J. S. concerning the premises, and in consideration of 6*d.* given by the one to the other, the one assumed to the other to stand to his award," that assumption being stated in the terms of it.[3] When mutual promises only were held to be a sufficient foundation for this action, it was no longer necessary to state any consideration for them in the declaration:

[1] Vid. Read v. Palmer, P. 24 Car. Al. 69, 70.

[2] I do not find any direct authority for this, but the general tenor of the cases seems to justify the conclusion. Smith v. Kirfoot, 1 Leon. 72, and Ormlade v. Coke, Cro. Jac. 354, are actions of debt on the award, but it does not appear whether either the submission or the award was verbal or in writing.

[3] Vid. Goodman v. Fountain, Cro. El. 861. Colston v. Harris, Id. 904.

when the act of submission was of itself considered as an implied promise to perform the award, it became of course sufficient to state the submission.

In all actions on the award, however, whether debt or assumpsit, it must necessarily be shewn that the parties submitted, before the award can be properly introduced; and that submission must be shewn in direct, unequivocal terms; 'that the arbitrator was nominated "on behalf" of the defendant,' is not sufficient; it must appear that he was in effect nominated *by* the defendant, which the former expression, it is said, does not sufficiently import, for the nomination may have been by some friend, to which the defendant might not have consented.[4]

It is also said, that it must appear for what cause the parties submitted;[5] perhaps the reason may be, that it ought to appear whether the award be according to the terms of the submission.

The submission, too, must be so stated as to correspond with the award and support it; otherwise the plaintiff cannot have judgment; therefore, where the declaration recited 'that certain differences had arisen between the plaintiff and the defendant, and that they had submitted to the arbitration of J. S. who had awarded, "of and upon the premises," that the defendant should pay to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one Woolly,' and the breach was assigned in the nonpayment of this money; though a verdict was given for the plaintiff,

[4] Dilly v. Polhill, 2 Str. 923.

[5] Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which seems a wrong citation.

yet the judgment was arrested, because it did not appear by the submission as recited, that the defendant was executor, administrator, or trustee for Woolly, or that he had any thing of his, or had submitted on his behalf.[6]

When the action is on a mutual assumpsit to pay a certain sum on request, if the defendant should not stand to the award, an actual request to pay that sum, before the action brought, must be stated; for in a case like this the request is an essential thing to entitle the plaintiff to his action; and there is a difference between a mere duty and a collateral sum; in the first case, as where there is a promise to pay on request all sums lent to the defendant, no actual request is necessary; the bringing of the action is a request; but in the latter case, an actual request is necessary, because the promise of payment on request is as a penalty, and collateral.[7] —And the averment "that though requested he had not paid," is not a sufficient allegation of the request made; it must be shewn, by positive affirmation, to have been made before the action brought.[8]

In an action on the assumpsit to perform the award, the plaintiff may assign several breaches; this case is not like that of a penal obligation, in an action on which, at common law, one breach only could be assigned, that being sufficient to forfeit the obligation; but, in the assumpsit, only damages are recoverable

[6] Adams v. Statham, 2 Lev. 235. 2 Show. 61.

[7] Birks v. Trippet, 1 Saund. 33. 2 Keb. 126.

[8] Semb. for in the case here cited the words "tho' requested" were inserted.

according to the extent of the loss sustained by the plaintiff on account of the nonperformance, and that may arise on every breach. In such a case, however, if one of the breaches be assigned in nonperformance of a part of the award which is void, and intire damages be given, the judgment will be arrested: thus, when an award of a release to a time beyond the submission was held to be void, if it had been awarded that the defendant should pay 15*l.* to the plaintiff in satisfaction of a judgment, and that he should also release to him all demands to the time of the award; and in an assumpsit on this award, the breach had been assigned in nonpayment of the money, and in not giving the release, if then intire damages had been given, a judgment on that verdict would have been erroneous.[9]

When the submission is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond;[1] but the latter is the action most usually brought, in which the order of pleading commonly observed is, that the plaintiff declares on the bond as in ordinary cases of actions on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant, and on that the whole question arises as on an original declaration. The defendant

[9] Jenk. 264. vid. Yelv. 35. a dictum which seems contra, with respect to the intirety of the damages.

[1] Vid. Str. 923. Freem. 410, 415.

then either rejoins that they made "no *such* award," on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer.[2]

Where, by the condition of the bond, the award must be made before a certain day, the defendant, instead of pleading simply that no award was made, may plead that no award was made before that day, because he is not bound to perform an award made after it; then the plaintiff in his replication must allege the award, which he sets forth, to have been made before the day.[3]

The plaintiff must indeed shew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely stated.[4]—But an allegation under a "videlicet" will be sufficient: thus, "that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff's bill, videlicet, on such a day, made their award," is sufficient. And a distinction is taken, between a case, where the words under the "videlicet" are repugnant to the preceding matter, and where they are not; in the former they are merely surplusage, and must be rejected; in the latter, they are an affirmation sufficiently positive that the award was made, on the day mentioned after the "videlicet," and no other day can be presumed.[5]

To this the defendant cannot rejoin, by saying that the arbitrators gave him no notice before the day, of

[2] 5 Ed. 4. 108. Brooke, pl. 33.
[3] 31 H. 6. Brooke Arb. pl. 42.
[4] 1 Sid. 370.
[5] 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.

any award made; for independently of any objection that might be made to the substance of the rejoinder, on account of the arbitrators not being bound to give notice of the award,[6] it is a departure from his plea, by which he had denied the existence of any award at all, before the day.[7]—In one book, we are told, that if the defendant wish to avail himself of want of notice, he must set the award forth in his plea, and then aver that he had no notice of it before the day.[8] This, however, seems an inconsistency; for how can he set forth that of which he had no notice? and if in fact he be enabled, at the time of his plea, to set forth the award, he will still, in many cases, be bound to perform it, though he had no notice on the day when it was made. The plaintiff too, might take issue on the fact, whether the defendant knew of the award before the commencement of the action.—And it appears, by subsequent resolutions, that, where the condition of the bond contains a proviso, "that the award should be made and delivered to the parties, on or before a particular day," by which a delivery accordingly becomes essential to bind the parties, the defendant "protesting that no award was made," may allege as a plea, "that after the making of the bond, and before or on the day appointed, no award was delivered to the parties, of or upon the premises, specified in the condition of the bond.[9]

If the plaintiff can contradict this plea, it is said, that he must do it in direct terms, alleging expressly

[6] Vid. p. 107. et seq.
[7] Keilw. 175. a.
[8] Id. ibid.
[9] Bendl. 39. Benl. 108. 2 Keb. 402.

that the arbitrators made their award, setting it forth with certainty, and that they delivered it to the parties in writing within the time limited.—It will not be sufficient, it is said in some places,[1] to allege the delivery, by way of inducement, in such terms as these, "That the arbitrators having, at such a time and place, undertaken the burthen of the award, after the execution of the bond and before the day appointed, *by* their award made in writing, and *then* and there delivered by the said arbitrators to the said parties, awarded, &c." It is however only said, in this case, that all the justices argued against the plaintiff, but no judgment was given. In another book,[2] it is adjudged that the allegation of delivery in this manner by inducement is sufficient.

The proviso contained in the condition of the submission bond was, that the award should be made and ready to be delivered by three o'clock in the afternoon of the sixth of April: the defendant pleaded that the arbitrator made no award of the premises before three o'clock of the day aforesaid, in the condition aforesaid, specified: it was objected that this plea was uncertain, because there were two moments of time which might satisfy the words three o'clock; and the award might have been made before three o'clock in the afternoon, though it was not made before three in the morning; the court held that this would have been a good exception, if the plaintiff had demurred for this cause, but as he had replied, the objection was not now open to him.[3]

[1] Dyer 243. b.

[2] Cro. Jac. 285.

[3] Bedam v. Clarkson, 1 Ld. Raym. 123, 124.

thing which it was impossible for the party to perform; the suit having ceased by the judgment, by relation, before the award was made.—And such is the imbecility of the human mind, when its views are contracted by the technical dogmas of a single science, that the judges, instead of rejecting this as mere jargon and absurd nonsense, very gravely observed, that though, by fiction of law, every judgment related to the first day of the term, yet as the plaintiff had in his declaration expressly averred that the defendant, after the time of the award made, had continued to prosecute his suit to judgment, and though it appeared to be of the same term, yet the defendant ought to have taken advantage of it, by special demurrer.[3]

If an award be that the one shall make a lease for a term of years to the other rendering rent, and the lease be accordingly made, and the tenant do not afterwards pay the rent, this is no breach of the award on the part of the tenant, nor is his submission bond forfeited; the remedy of the lessor for his rent is the same as in every other case of landlord and tenant: the award was completely performed by his acceptance of the lease with the rent reserved.[4]

So, if it be awarded that the defendant enter into a bond for the payment of money to the plaintiff at a future day; if he give the bond, that is performance of the award, and by nonpayment at the day, he will forfeit only the bond awarded, not the bond of submission.[5]

[3] Huys v. Wright, 1 Jac. Yelverton 35.

[4] Benl. 15. pl. 16. 27 Hen. 8.

More. 3. pl. 8. there said to be 28 Hen. 8.

[5] Str. 903. 1 Barnard. 463.

So, in the case of an award to give a note for the payment of money, the giving of the note accordingly will be performance, and the plaintiff must on non-payment be confined to his action on the note.[6]

If an award be made between the grantee of a rent and the terre-tenant of the land out of which the rent issues, "that the grantor shall stand acquitted of the rent," the grantee is not bound by this to give the tenant a release; it is sufficient if he never pursue any remedy for the recovery of the rent, by action or distress.[7]

[6] Booth v. Garnett, Str. 1082. [7] 2 Bulstr. 96.

## CHAPTER VI.

### THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD OR UMPIRAGE IS PROPERLY MADE.

IN the Roman law, the only remedy which either party could have against the other for disobedience of the award was to sue for the penalty expressed in the submission.[8] But with us the remedy is various, according to the various *forms* of the submission.

Though the submission be verbal, it has been seen,[9] that in all cases an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by slow degrees that it was held that the act of submission implied in itself a promise to perform the award; before the courts went so far, they held that the promise was collateral to the submission, and that where it was laid to have been made at the *same time* with the submission, proof of the latter might have been considered by the jury as a foundation for presuming the former: but if the promise had been laid to have been made at any other time, though on the same day with the submis-

[8] Vid. p. 8. 9.

[9] P. 11.

sion, then in an action on the case, proof must have been given of an actual promise.[1]

Where the award, on a parol submission, is for the payment of money, the action on the award may be an action of debt, as well as where the submission is by deed, and as well where the award is verbal, as where it is in writing.[2] It may also be an action of *assumpsit:* in all other cases on a parol submission, an *assumpsit* is the only species of action that will lie.

When the courts would not support an action on an award of a collateral thing, where the submission was verbal, unless there were actually mutual promises to stand to the award, on consideration of a certain specific sum, it was, of course, necessary that the declaration should run in some such form as this: "Whereas certain differences subsisted between the plaintiff and the defendant, and they had submitted themselves to the award of J. S. concerning the premises, and in consideration of 6*d.* given by the one to the other, the one assumed to the other to stand to his award," that assumption being stated in the terms of it.[3] When mutual promises only were held to be a sufficient foundation for this action, it was no longer necessary to state any consideration for them in the declaration:

[1] Vid. Read v. Palmer, P. 24 Car. Al. 69, 70.

[2] I do not find any direct authority for this, but the general tenor of the cases seems to justify the conclusion. Smith v. Kirfoot, 1 Leon. 72. and Ormlade v. Coke, Cro. Jac. 354, are actions of debt on the award, but it does not appear whether either the submission or the award was verbal or in writing.

[3] Vid. Goodman v. Fountain, Cro. El. 861. Colston v. Harris, Id. 904.

when the act of submission was of itself considered as an implied promise to perform the award, it became of course sufficient to state the submission.

In all actions on the award, however, whether debt or assumpsit, it must necessarily be shewn that the parties submitted, before the award can be properly introduced; and that submission must be shewn in direct, unequivocal terms; 'that the arbitrator was nominated "on behalf" of the defendant,' is not sufficient; it must appear that he was in effect nominated *by* the defendant, which the former expression, it is said, does not sufficiently import, for the nomination may have been by some friend, to which the defendant might not have consented.[4]

It is also said, that it must appear for what cause the parties submitted;[5] perhaps the reason may be, that it ought to appear whether the award be according to the terms of the submission.

The submission, too, must be so stated as to correspond with the award and support it; otherwise the plaintiff cannot have judgment; therefore, where the declaration recited 'that certain differences had arisen between the plaintiff and the defendant, and that they had submitted to the arbitration of J. S. who had awarded, "of and upon the premises," that the defendant should pay to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one Woolly,' and the breach was assigned in the nonpayment of this money; though a verdict was given for the plaintiff,

[4] Dilly v. Polhill, 2 Str. 923.

[5] Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which seems a wrong citation.

yet the judgment was arrested, because it did not appear by the submission as recited, that the defendant was executor, administrator, or trustee for Woolly, or that he had any thing of his, or had submitted on his behalf.[6]

When the action is on a mutual assumpsit to pay a certain sum on request, if the defendant should not stand to the award, an actual request to pay that sum, before the action brought, must be stated; for in a case like this the request is an essential thing to entitle the plaintiff to his action; and there is a difference between a mere duty and a collateral sum; in the first case, as where there is a promise to pay on request all sums lent to the defendant, no actual request is necessary; the bringing of the action is a request; but in the latter case, an actual request is necessary, because the promise of payment on request is as a penalty, and collateral.[7] —And the averment "that though requested he had not paid," is not a sufficient allegation of the request made; it must be shewn, by positive affirmation, to have been made before the action brought.[8]

In an action on the assumpsit to perform the award, the plaintiff may assign several breaches; this case is not like that of a penal obligation, in an action on which, at common law, one breach only could be assigned, that being sufficient to forfeit the obligation; but, in the assumpsit, only damages are recoverable

[6] Adams v. Statham, 2 Lev. 235. 2 Show. 61.

[7] Birks v. Trippet, 1 Saund. 33. 2 Keb. 126.

[8] Semb. for in the case here cited the words "tho' requested" were inserted.

according to the extent of the loss sustained by the plaintiff on account of the nonperformance, and that may arise on every breach. In such a case, however, if one of the breaches be assigned in nonperformance of a part of the award which is void, and intire damages be given, the judgment will be arrested: thus, when an award of a release to a time beyond the submission was held to be void, if it had been awarded that the defendant should pay 15*l.* to the plaintiff in satisfaction of a judgment, and that he should also release to him all demands to the time of the award; and in an assumpsit on this award, the breach had been assigned in nonpayment of the money, and in not giving the release, if then intire damages had been given, a judgment on that verdict would have been erroneous.[9]

When the submission is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond;[1] but the latter is the action most usually brought, in which the order of pleading commonly observed is, that the plaintiff declares on the bond as in ordinary cases of actions on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant, and on that the whole question arises as on an original declaration. The defendant

[9] Jenk. 264. vid. Yelv. 35. a dictum which seems contra, with respect to the intirety of the damages.

[1] Vid. Str. 923. Freem. 410, 415.

then either rejoins that they made "no *such* award," on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer.[2]

Where, by the condition of the bond, the award must be made before a certain day, the defendant, instead of pleading simply that no award was made, may plead that no award was made before that day, because he is not bound to perform an award made after it; then the plaintiff in his replication must allege the award, which he sets forth, to have been made before the day.[3]

The plaintiff must indeed shew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely stated.[4]—But an allegation under a "videlicet" will be sufficient: thus, "that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff's bill, videlicet, on such a day, made their award," is sufficient. And a distinction is taken, between a case, where the words under the "videlicet" are repugnant to the preceding matter, and where they are not; in the former they are merely surplusage, and must be rejected; in the latter, they are an affirmation sufficiently positive that the award was made, on the day mentioned after the "videlicet," and no other day can be presumed.[5]

To this the defendant cannot rejoin, by saying that the arbitrators gave him no notice before the day, of

[2] 5 Ed. 4. 108. Brooke, pl. 33.
[3] 31 H. 8. Brooke Arb. pl. 42.
[4] 1 Sid. 370.
[5] 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.

thing which it was impossible for the party to perform; the suit having ceased by the judgment, by relation, before the award was made.—And such is the imbecility of the human mind, when its views are contracted by the technical dogmas of a single science, that the judges, instead of rejecting this as mere jargon and absurd nonsense, very gravely observed, that though, by fiction of law, every judgment related to the first day of the term, yet as the plaintiff had in his declaration expressly averred that the defendant, after the time of the award made, had continued to prosecute his suit to judgment, and though it appeared to be of the same term, yet the defendant ought to have taken advantage of it, by special demurrer.[3]

If an award be that the one shall make a lease for a term of years to the other rendering rent, and the lease be accordingly made, and the tenant do not afterwards pay the rent, this is no breach of the award on the part of the tenant, nor is his submission bond forfeited; the remedy of the lessor for his rent is the same as in every other case of landlord and tenant: the award was completely performed by his acceptance of the lease with the rent reserved.[4]

So, if it be awarded that the defendant enter into a bond for the payment of money to the plaintiff at a future day; if he give the bond, that is performance of the award, and by nonpayment at the day, he will forfeit only the bond awarded, not the bond of submission.[5]

[3] Huys v. Wright, 1 Jac. Yelverton 35.

[4] Benl. 15. pl. 16. 27 Hen. 8. More. 3. pl. 8. there said to be 28 Hen. 8.

[5] Str. 903. 1 Barnard. 463.

So, in the case of an award to give a note for the payment of money, the giving of the note accordingly will be performance, and the plaintiff must on non-payment be confined to his action on the note.[6]

If an award be made between the grantee of a rent and the terre-tenant of the land out of which the rent issues, "that the grantor shall stand acquitted of the rent," the grantee is not bound by this to give the tenant a release; it is sufficient if he never pursue any remedy for the recovery of the rent, by action or distress.[7]

[6] Booth v. Garnett, Str. 1082. [7] 2 Bulstr. 96.

thing which it was impossible for the party to perform; the suit having ceased by the judgment, by relation, before the award was made.—And such is the imbecility of the human mind, when its views are contracted by the technical dogmas of a single science, that the judges, instead of rejecting this as mere jargon and absurd nonsense, very gravely observed, that though, by fiction of law, every judgment related to the first day of the term, yet as the plaintiff had in his declaration expressly averred that the defendant, after the time of the award made, had continued to prosecute his suit to judgment, and though it appeared to be of the same term, yet the defendant ought to have taken advantage of it, by special demurrer.[3]

If an award be that the one shall make a lease for a term of years to the other rendering rent, and the lease be accordingly made, and the tenant do not afterwards pay the rent, this is no breach of the award on the part of the tenant, nor is his submission bond forfeited; the remedy of the lessor for his rent is the same as in every other case of landlord and tenant: the award was completely performed by his acceptance of the lease with the rent reserved.[4]

So, if it be awarded that the defendant enter into a bond for the payment of money to the plaintiff at a future day; if he give the bond, that is performance of the award, and by nonpayment at the day, he will forfeit only the bond awarded, not the bond of submission.[5]

[3] Huys v. Wright, 1 Jac. Yelverton 35.

[4] Benl. 15. pl. 16. 27 Hen. 8. More. 3. pl. 8. there said to be 28 Hen. 8.

[5] Str. 903. 1 Barnard. 463.

So, in the case of an award to give a note for the payment of money, the giving of the note accordingly will be performance, and the plaintiff must on non-payment be confined to his action on the note.[6]

If an award be made between the grantee of a rent and the terre-tenant of the land out of which the rent issues, "that the grantor shall stand acquitted of the rent," the grantee is not bound by this to give the tenant a release; it is sufficient if he never pursue any remedy for the recovery of the rent, by action or distress.[7]

[6] Booth v. Garnett, Str. 1082. [7] 2 Bulstr. 96.

## CHAPTER VI.

### THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD OR UMPIRAGE IS PROPERLY MADE.

IN the Roman law, the only remedy which either party could have against the other for disobedience of the award was to sue for the penalty expressed in the submission.[8] But with us the remedy is various, according to the various *forms* of the submission.

Though the submission be verbal, it has been seen,[9] that in all cases an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by slow degrees that it was held that the act of submission implied in itself a promise to perform the award; before the courts went so far, they held that the promise was collateral to the submission, and that where it was laid to have been made at the *same time* with the submission, proof of the latter might have been considered by the jury as a foundation for presuming the former: but if the promise had been laid to have been made at any other time, though on the same day with the submis-

[8] Vid. p. 8. 9.

[9] P. 11.

sion, then in an action on the case, proof must have been given of an actual promise.[1]

Where the award, on a parol submission, is for the payment of money, the action on the award may be an action of debt, as well as where the submission is by deed, and as well where the award is verbal, as where it is in writing.[2] It may also be an action of *assumpsit:* in all other cases on a parol submission, an *assumpsit* is the only species of action that will lie.

When the courts would not support an action on an award of a collateral thing, where the submission was verbal, unless there were actually mutual promises to stand to the award, on consideration of a certain specific sum, it was, of course, necessary that the declaration should run in some such form as this: "Whereas certain differences subsisted between the plaintiff and the defendant, and they had submitted themselves to the award of J. S. concerning the premises, and in consideration of 6*d.* given by the one to the other, the one assumed to the other to stand to his award," that assumption being stated in the terms of it.[3] When mutual promises only were held to be a sufficient foundation for this action, it was no longer necessary to state any consideration for them in the declaration:

[1] Vid. Read v. Palmer, P. 24 Car. Al. 69, 70.

[2] I do not find any direct authority for this, but the general tenor of the cases seems to justify the conclusion. Smith v. Kirfoot, 1 Leon. 72. and Ormlade v. Coke, Cro. Jac. 354, are actions of debt on the award, but it does not appear whether either the submission or the award was verbal or in writing.

[3] Vid. Goodman v. Fountain, Cro. El. 861. Colston v. Harris, Id. 904.

when the act of submission was of itself considered as an implied promise to perform the award, it became of course sufficient to state the submission.

In all actions on the award, however, whether debt or assumpsit, it must necessarily be shewn that the parties submitted, before the award can be properly introduced; and that submission must be shewn in direct, unequivocal terms; 'that the arbitrator was nominated "on behalf" of the defendant,' is not sufficient; it must appear that he was in effect nominated *by* the defendant, which the former expression, it is said, does not sufficiently import, for the nomination may have been by some friend, to which the defendant might not have consented.[4]

It is also said, that it must appear for what cause the parties submitted;[5] perhaps the reason may be, that it ought to appear whether the award be according to the terms of the submission.

The submission, too, must be so stated as to correspond with the award and support it; otherwise the plaintiff cannot have judgment; therefore, where the declaration recited 'that certain differences had arisen between the plaintiff and the defendant, and that they had submitted to the arbitration of J. S. who had awarded, "of and upon the premises," that the defendant should pay to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one Woolly,' and the breach was assigned in the nonpayment of this money; though a verdict was given for the plaintiff,

[4] Dilly v. Polhill, 2 Str. 923.

[5] Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which seems a wrong citation.

yet the judgment was arrested, because it did not appear by the submission as recited, that the defendant was executor, administrator, or trustee for Woolly, or that he had any thing of his, or had submitted on his behalf.[6]

When the action is on a mutual assumpsit to pay a certain sum on request, if the defendant should not stand to the award, an actual request to pay that sum, before the action brought, must be stated; for in a case like this the request is an essential thing to entitle the plaintiff to his action; and there is a difference between a mere duty and a collateral sum; in the first case, as where there is a promise to pay on request all sums lent to the defendant, no actual request is necessary; the bringing of the action is a request; but in the latter case, an actual request is necessary, because the promise of payment on request is as a penalty, and collateral.[7] —And the averment "that though requested he had not paid," is not a sufficient allegation of the request made; it must be shewn, by positive affirmation, to have been made before the action brought.[8]

In an action on the assumpsit to perform the award, the plaintiff may assign several breaches; this case is not like that of a penal obligation, in an action on which, at common law, one breach only could be assigned, that being sufficient to forfeit the obligation; but, in the assumpsit, only damages are recoverable

[6] Adams v. Statham, 2 Lev. 235. 2 Show. 61.

[7] Birks v. Trippet, 1 Saund. 33. 2 Keb. 126.

[8] Semb. for in the case here cited the words "tho' requested" were inserted.

according to the extent of the loss sustained by the plaintiff on account of the nonperformance, and that may arise on every breach. In such a case, however, if one of the breaches be assigned in nonperformance of a part of the award which is void, and intire damages be given, the judgment will be arrested: thus, when an award of a release to a time beyond the submission was held to be void, if it had been awarded that the defendant should pay 15*l.* to the plaintiff in satisfaction of a judgment, and that he should also release to him all demands to the time of the award; and in an assumpsit on this award, the breach had been assigned in nonpayment of the money, and in not giving the release, if then intire damages had been given, a judgment on that verdict would have been erroneous.[9]

When the submission is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond;[1] but the latter is the action most usually brought, in which the order of pleading commonly observed is, that the plaintiff declares on the bond as in ordinary cases of actions on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant, and on that the whole question arises as on an original declaration. The defendant

[9] Jenk. 264. vid. Yelv. 35. a dictum which seems contra, with respect to the intirety of the damages.

[1] Vid. Str. 923. Freem. 410, 415.

then either rejoins that they made "no *such* award," on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer.[2]

Where, by the condition of the bond, the award must be made before a certain day, the defendant, instead of pleading simply that no award was made, may plead that no award was made before that day, because he is not bound to perform an award made after it; then the plaintiff in his replication must allege the award, which he sets forth, to have been made before the day.[3]

The plaintiff must indeed shew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely stated.[4]—But an allegation under a "videlicet" will be sufficient: thus, "that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff's bill, videlicet, on such a day, made their award," is sufficient. And a distinction is taken, between a case, where the words under the "videlicet" are repugnant to the preceding matter, and where they are not; in the former they are merely surplusage, and must be rejected; in the latter, they are an affirmation sufficiently positive that the award was made, on the day mentioned after the "videlicet," and no other day can be presumed.[5]

To this the defendant cannot rejoin, by saying that the arbitrators gave him no notice before the day, of

[2] 5 Ed. 4. 108. Brooke, pl. 33.
[3] 31 H. 8. Brooke Arb. pl. 42.
[4] 1 Sid. 370.
[5] 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.

according to the extent of the loss sustained by the plaintiff on account of the nonperformance, and that may arise on every breach. In such a case, however, if one of the breaches be assigned in nonperformance of a part of the award which is void, and intire damages be given, the judgment will be arrested: thus, when an award of a release to a time beyond the submission was held to be void, if it had been awarded that the defendant should pay 15*l.* to the plaintiff in satisfaction of a judgment, and that he should also release to him all demands to the time of the award; and in an assumpsit on this award, the breach had been assigned in nonpayment of the money, and in not giving the release, if then intire damages had been given, a judgment on that verdict would have been erroneous.[9]

When the submission is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond;[1] but the latter is the action most usually brought, in which the order of pleading commonly observed is, that the plaintiff declares on the bond as in ordinary cases of actions on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant, and on that the whole question arises as on an original declaration. The defendant

[9] Jenk. 264. vid. Yelv. 35. a dictum which seems contra, with respect to the intirety of the damages.

[1] Vid. Str. 923. Freem. 410, 415.

then either rejoins that they made "no *such* award," on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer.[2]

Where, by the condition of the bond, the award must be made before a certain day, the defendant, instead of pleading simply that no award was made, may plead that no award was made before that day, because he is not bound to perform an award made after it; then the plaintiff in his replication must allege the award, which he sets forth, to have been made before the day.[3]

The plaintiff must indeed shew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely stated.[4]—But an allegation under a "videlicet" will be sufficient: thus, "that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff's bill, videlicet, on such a day, made their award," is sufficient. And a distinction is taken, between a case, where the words under the "videlicet" are repugnant to the preceding matter, and where they are not; in the former they are merely surplusage, and must be rejected; in the latter, they are an affirmation sufficiently positive that the award was made, on the day mentioned after the "videlicet," and no other day can be presumed.[5]

To this the defendant cannot rejoin, by saying that the arbitrators gave him no notice before the day, of

[2] 5 Ed. 4. 108. Brooke, pl. 33.
[3] 31 H. 8. Brooke Arb. pl. 42.
[4] 1 Sid. 370.
[5] 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.

## CHAPTER VI.

### THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD OR UMPIRAGE IS PROPERLY MADE.

IN the Roman law, the only remedy which either party could have against the other for disobedience of the award was to sue for the penalty expressed in the submission.[8] But with us the remedy is various, according to the various *forms* of the submission.

Though the submission be verbal, it has been seen,[9] that in all cases an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by slow degrees that it was held that the act of submission implied in itself a promise to perform the award; before the courts went so far, they held that the promise was collateral to the submission, and that where it was laid to have been made at the *same time* with the submission, proof of the latter might have been considered by the jury as a foundation for presuming the former: but if the promise had been laid to have been made at any other time, though on the same day with the submis-

[8] Vid. p. 8. 9.

[9] P. 11.

sion, then in an action on the case, proof must have been given of an actual promise.[1]

Where the award, on a parol submission, is for the payment of money, the action on the award may be an action of debt, as well as where the submission is by deed, and as well where the award is verbal, as where it is in writing.[2] It may also be an action of *assumpsit:* in all other cases on a parol submission, an *assumpsit* is the only species of action that will lie.

When the courts would not support an action on an award of a collateral thing, where the submission was verbal, unless there were actually mutual promises to stand to the award, on consideration of a certain specific sum, it was, of course, necessary that the declaration should run in some such form as this: "Whereas certain differences subsisted between the plaintiff and the defendant, and they had submitted themselves to the award of J. S. concerning the premises, and in consideration of 6*d.* given by the one to the other, the one assumed to the other to stand to his award," that assumption being stated in the terms of it.[3] When mutual promises only were held to be a sufficient foundation for this action, it was no longer necessary to state any consideration for them in the declaration:

[1] Vid. Read v. Palmer, P. 24 Car. Al. 69, 70.

[2] I do not find any direct authority for this, but the general tenor of the cases seems to justify the conclusion. Smith v. Kirfoot, 1 Leon. 72. and Ormlade v. Coke, Cro. Jac. 354, are actions of debt on the award, but it does not appear whether either the submission or the award was verbal or in writing.

[3] Vid. Goodman v. Fountain, Cro. El. 861. Colston v. Harris, Id. 904.

## CHAPTER VI.

### THE REMEDY TO COMPEL PERFORMANCE, WHEN THE AWARD OR UMPIRAGE IS PROPERLY MADE.

IN the Roman law, the only remedy which either party could have against the other for disobedience of the award was to sue for the penalty expressed in the submission.[8] But with us the remedy is various, according to the various *forms* of the submission.

Though the submission be verbal, it has been seen,[9] that in all cases an action may be maintained on the award, whether it be for the payment of money, or for the performance of a collateral act; where it was of the latter kind, however, it was not but by slow degrees that it was held that the act of submission implied in itself a promise to perform the award; before the courts went so far, they held that the promise was collateral to the submission, and that where it was laid to have been made at the *same time* with the submission, proof of the latter might have been considered by the jury as a foundation for presuming the former: but if the promise had been laid to have been made at any other time, though on the same day with the submis-

[8] Vid. p. 8. 9.

[9] P. 11.

sion, then in an action on the case, proof must have been given of an actual promise.[1]

Where the award, on a parol submission, is for the payment of money, the action on the award may be an action of debt, as well as where the submission is by deed, and as well where the award is verbal, as where it is in writing.[2] It may also be an action of *assumpsit:* in all other cases on a parol submission, an *assumpsit* is the only species of action that will lie.

When the courts would not support an action on an award of a collateral thing, where the submission was verbal, unless there were actually mutual promises to stand to the award, on consideration of a certain specific sum, it was, of course, necessary that the declaration should run in some such form as this: "Whereas certain differences subsisted between the plaintiff and the defendant, and they had submitted themselves to the award of J. S. concerning the premises, and in consideration of 6*d.* given by the one to the other, the one assumed to the other to stand to his award," that assumption being stated in the terms of it.[3] When mutual promises only were held to be a sufficient foundation for this action, it was no longer necessary to state any consideration for them in the declaration:

[1] Vid. Read v. Palmer, P. 24 Car. Al. 69, 70.

[2] I do not find any direct authority for this, but the general tenor of the cases seems to justify the conclusion. Smith v. Kirfoot, 1 Leon. 72, and Ormlade v. Coke, Cro. Jac. 354, are actions of debt on the award, but it does not appear whether either the submission or the award was verbal or in writing.

[3] Vid. Goodman v. Fountain, Cro. El. 861. Colston v. Harris, Id. 904.

when the act of submission was of itself considered as an implied promise to perform the award, it became of course sufficient to state the submission.

In all actions on the award, however, whether debt or assumpsit, it must necessarily be shewn that the parties submitted, before the award can be properly introduced; and that submission must be shewn in direct, unequivocal terms; 'that the arbitrator was nominated "on behalf" of the defendant,' is not sufficient; it must appear that he was in effect nominated *by* the defendant, which the former expression, it is said, does not sufficiently import, for the nomination may have been by some friend, to which the defendant might not have consented.[4]

It is also said, that it must appear for what cause the parties submitted;[5] perhaps the reason may be, that it ought to appear whether the award be according to the terms of the submission.

The submission, too, must be so stated as to correspond with the award and support it; otherwise the plaintiff cannot have judgment; therefore, where the declaration recited 'that certain differences had arisen between the plaintiff and the defendant, and that they had submitted to the arbitration of J. S. who had awarded, "of and upon the premises," that the defendant should pay to the plaintiff 30*l.* in satisfaction of all sums due to him out of the estate of one Woolly,' and the breach was assigned in the nonpayment of this money; though a verdict was given for the plaintiff,

[4] Dilly v. Polhill, 2 Str. 923.

[5] Brooke Arb. pl. 34, cites 5 Ed. 4. 1. which seems a wrong citation.

yet the judgment was arrested, because it did not appear by the submission as recited, that the defendant was executor, administrator, or trustee for Woolly, or that he had any thing of his, or had submitted on his behalf.[6]

When the action is on a mutual assumpsit to pay a certain sum on request, if the defendant should not stand to the award, an actual request to pay that sum, before the action brought, must be stated; for in a case like this the request is an essential thing to entitle the plaintiff to his action; and there is a difference between a mere duty and a collateral sum; in the first case, as where there is a promise to pay on request all sums lent to the defendant, no actual request is necessary; the bringing of the action is a request; but in the latter case, an actual request is necessary, because the promise of payment on request is as a penalty, and collateral.[7] —And the averment "that though requested he had not paid," is not a sufficient allegation of the request made; it must be shewn, by positive affirmation, to have been made before the action brought.[8]

In an action on the assumpsit to perform the award, the plaintiff may assign several breaches; this case is not like that of a penal obligation, in an action on which, at common law, one breach only could be assigned, that being sufficient to forfeit the obligation; but, in the assumpsit, only damages are recoverable

[6] Adams v. Statham, 2 Lev. 235. 2 Show. 61.

[7] Birks v. Trippet, 1 Saund. 33. 2 Keb. 126.

[8] Semb. for in the case here cited the words "tho' requested" were inserted.

according to the extent of the loss sustained by the plaintiff on account of the nonperformance, and that may arise on every breach. In such a case, however, if one of the breaches be assigned in nonperformance of a part of the award which is void, and intire damages be given, the judgment will be arrested: thus, when an award of a release to a time beyond the submission was held to be void, if it had been awarded that the defendant should pay 15*l.* to the plaintiff in satisfaction of a judgment, and that he should also release to him all demands to the time of the award; and in an assumpsit on this award, the breach had been assigned in nonpayment of the money, and in not giving the release, if then intire damages had been given, a judgment on that verdict would have been erroneous.[9]

When the submission is by bond, if the award be for the payment of money, an action of debt on the award lies, as well as an action on the bond;[1] but the latter is the action most usually brought, in which the order of pleading commonly observed is, that the plaintiff declares on the bond as in ordinary cases of actions on a bond; the defendant then prays oyer of the condition, which being set forth, he pleads that the arbitrators or the umpire made "no award;" then the plaintiff replies, not barely alleging that they did, but setting forth the award at large, and assigning the breach by the defendant, and on that the whole question arises as on an original declaration. The defendant

[9] Jenk. 264. vid. Yelv. 35. a dictum which seems contra, with respect to the intirety of the damages.

[1] Vid. Str. 923. Freem. 410, 415.

then either rejoins that they made "no *such* award," on which the plaintiff takes issue—or, he demurs, and the plaintiff joins in demurrer.[2]

Where, by the condition of the bond, the award must be made before a certain day, the defendant, instead of pleading simply that no award was made, may plead that no award was made before that day, because he is not bound to perform an award made after it; then the plaintiff in his replication must allege the award, which he sets forth, to have been made before the day.[3]

The plaintiff must indeed shew that the award was made within the time limited, whether the defendant plead in this manner or not; for without that, his right of action will not be completely stated.[4]—But an allegation under a "videlicet" will be sufficient: thus, "that the arbitrators, after the execution of the bond, and before the exhibiting of the plaintiff's bill, videlicet, on such a day, made their award," is sufficient. And a distinction is taken, between a case, where the words under the "videlicet" are repugnant to the preceding matter, and where they are not; in the former they are merely surplusage, and must be rejected; in the latter, they are an affirmation sufficiently positive that the award was made, on the day mentioned after the "videlicet," and no other day can be presumed.[5]

To this the defendant cannot rejoin, by saying that the arbitrators gave him no notice before the day, of

[2] 5 Ed. 4. 108. Brooke, pl. 33.
[3] 31 H. 8. Brooke Arb. pl. 42.
[4] 1 Sid. 370.
[5] 1 Saund. 169. 2 Keb. 361, 388. 3 Bur. 1729, 1730.

And at first, a distinction was made between the case, where the party, after having, by rule of *nisi prius*, consented to submit, afterwards withdrew his submission before any award was made, and the case where, continuing his submission, he afterwards refused to perform the award. In the former case the attachment was generally granted; in the latter it was refused, because in the former there was no other remedy; in the latter the opposite party might have his remedy on the award.[7]

Sometimes the objection was only to the manner in which the application for an attachment was made; it having been declared that an attachment should not be granted on a general suggestion of a breach of the award without notice to the party against whom it was moved; but that he who would have an attachment must suggest a breach by "affidavit," and then the defendant might come in and shew cause why an attachment should not issue, and so the matter might come in debate.[8]

While the courts of law, however, were so unwilling to enforce obedience to an award by process of contempt; the courts of equity made no difficulty in doing it, where the submission was under one of their rules.[9]

In such a case, it has lately been decided, that where an order has been made that the award shall stand, but no writ of execution of the order has been served on the party against whom the award is made, the proper

[7] 2 Keb. 22. 3 Keb. 844.
[8] 1 Keb. 634.
[9] Hide v. Pettit, 22 Car. 2. 1 Ca. Ch.

motion is "that he shall stand committed for nonperformance; not that an attachment may issue against him:" and the service of notice of this motion must be personal, not on the party's clerk in court, and the reason given for requiring this personal service is that, by the reference, the cause is out of court:—but where a writ of execution of the order has been served on the party, a motion for an attachment may be made, though the *submission* did not contain any express undertaking to perform the award, or has not been made a rule of court.[1]

Afterwards the courts of law ran into the contrary extreme, and in all cases granted an attachment, whether the award was void or not in point of law, observing that the reference being by rule of court by consent of counsel in the cause, there ought to be a rule for performance, for the abuse to the court; that if no attachment were to go, the party in whose favour the award was made, would be deluded by the trial being put off, and there ought either to be no submission, or that ought not to be elusory.[2]

But now the course of proceeding to obtain an attachment is this; the award must be tendered to the party against whom it is intended to move for the attachment, and if he refuse to accept it, affidavit of the due execution of the award, and of such tender and refusal, must be made, and on that an application made to the court to have the order of *nisi prius* made

[1] Knox v. Simmonds, 3 Brown. Ch. Rep. 361.—This seems to be the meaning of the report, which is somewhat confused.

[2] 3 Keb. 164, 446. Comb. 303.

a rule of court; then a copy of this rule must be served on the party refusing to accept the award; if he still refuse to accept it, an affidavit must be made of personal service of the rule, and of the disobedience to it; and then on application, grounded on that affidavit, an attachment will be ordered of course.[3]

When the award is accepted, but the money being demanded is not paid, an affidavit must be made of the due execution of the award, and of the demand and refusal of the money. And an indorsement on an award unstamped, is a sufficient authority to a third person to demand the money awarded; it is not necessary that there should be a warrant of attorney for that purpose.[4]

On references at *nisi prius*, it is not unusual for the plaintiff to take a verdict by consent, for security. And if the award be made in his favour, he may, at his election, either enter up judgment on the verdict, and take out execution for the sum awarded, if that does not exceed the sum for which the verdict was taken; or he may proceed by attachment. But, he cannot enter up judgment without leave of the court;[5] and to obtain that, it is as necessary to produce an affidavit of the due execution of the award, and the demand of the money awarded, as it is, to obtain an attachment.[6]

Where the submission is by bond with consent to have the "award" made a rule of court, it is said, that the court will not grant its interposition; and it is certain, that the words of the statute do not extend to that case; they provide only for the case of a consent

[3] 1 Crompton's Practice, 264.
[4] 2 Bl. Rep. 990, 991.
[5] 1 Salk. 84.
[6] Barnes, 58. [Borrowdale v. Hitchner, 3 Bos. and Pull. 244. and Lee v. Lingard, 1 East, 401. contra.]

to have the "submission" made a rule of court.[7] But where the submission has been made a rule of court, it is not necessary there should be another application to have the award made a rule of court, in order to ground an attachment: that will be granted without such application.[8]

The party in whose favour an award is made, when the submission is according to the statute, may have his remedy by attachment, though he may have obtained judgment in an action on the bond, or on the award; for he may perhaps think an attachment a more expeditious and effectual process than suing out execution on the judgment.[9]

And though the defendant may be in custody on an attachment, the court will not stay proceedings in an action of debt on the bond, or on the award, because if the defendant die in execution on the attachment that execution is at an end, and cannot be revived against his heirs or executors; for the statute says, that the attachment shall be prosecuted as in the case of a contempt in other cases: and a contempt dies with the person, and cannot be prosecuted against his representatives;[1] but if he die in execution on a judgment, the plaintiff may still have an execution on his goods.[2] But, if the defendant be taken in execution on the judgment, the attachment will be discharged.[3] And if

[7] Vid. Harrison v. Grundy, 2 Str. 1178. Anon. 2 Barnard. B. R. 163. [3 East, 603. Pedley v. Westmacot, contra.]

[8] Salk. 71. [8 T. R. 87. Jenkins v. Law, 5 East, 189. Evans v. Thomson.]

[9] 1 Salk. 73. 10 Mod. 333.

[1] Determined by the Judges in Webster v. Bishop, Prec. in Ch. 223. 2 Vern. 444.

[2] Paterson v. Gross, 2 Barnard. B. R. 227.

[3] Vid. Richardson v. Chancey, 1 Barnard. 386. cited B. R. H. 107.

an action be brought before an application is made for an attachment, it will be refused, during the pendency of the action, unless some very particular reason appear to the court for granting it.—This case was compared to the case of the several remedies which are allowed on a mortgage, a bill for foreclosure, an action on the bond, and an ejectment to obtain the possession, which are allowed to be all used at once. But Lord Hardwicke answered, that these several remedies were for different purposes, and remedies to which the party is intitled by the course of law, without the leave of the court; but the two remedies in the present case had but one object, that of enforcing obedience to the award, and the one was by the course of law, while the other depended on the discretion of the court.[4]—In a late case, where an action had been brought on an award in the King's Bench, and the plaintiff applied to the court of common pleas for an attachment, offering to discontinue his action, the court refused it, on the ground that he had made his election.[5]

If the time limited for making the award expire without any award made, there must be a second application for making the submission to a second arbitrator a rule of court, or else the court cannot grant an attachment for nonperformance of the second arbitrator's award.[6] And the submission must be made by the parties on the record: therefore, an attachment

[4] Stock and Huggins v. De Smith, B. R. H. 106. vid. Hutchins v. Hutchins, Andr. 297. Anon. id. 299.

[5] Badley v. Loveday, Puller and Bosanquet's Rep. in Com. Pleas, 81.

[6] Owen v. Hurd. 2 Term Rep. 643, 4.

was refused, where it appeared that a submission to an award between A. and B. had been made a rule of court; but no award having been made within the time, the dispute had been referred to a second arbitrator, by B. and C. who were the real parties, without an application to make this submission a rule of court.—And the court would not go into the merits, though the defendant offered to waive the objection, because they had no jurisdiction.[7]

When the submission is made a rule of court according to the statute, the affidavits, to ground an attachment, need not be intitled in any cause, for till the rule for the attachment is granted, there is no proceeding in court.—But the affidavits in answer must be intitled.[8]

In both forms of submission, it is discretionary in the court, to enforce the award by attachment or not. —The plaintiff had brought an action against the defendant for diverting a water-course; the matter was referred to arbitrators, who awarded that the defendant should fill up a canal, restore the stream to its former course, and do several other matters relating to the water-works. The plaintiff afterwards applied to the court for an attachment for nonperformance of the award, and read several affidavits to found his application. The defendant in answer read several affidavits to prove his compliance with the directions of the award. The court therefore refused an attachment, on account of the contrariety of evidence, and left the plaintiff to his remedy by action.[9]

[7] Owen v. Hurd, 2 Term Rep. 643.

[8] Bevan v. Bevan, 3 Term Rep. 601.

[9] Sir Thomas Hales v. Taylor, 1 Str. 695.

They may also refuse to enforce an award by attachment, when it appears to be a hard case upon the defendant, though they cannot for that reason set the award aside.[1]

An attachment for nonperformance of an award is only in the nature of a civil execution, and therefore a party cannot be arrested on it, on a Sunday.[2]

When the award is for the payment of money, the only remedies to enforce performance are those which have hitherto been considered.[3]—But when it is for the performance of any collateral act, it may sometimes be enforced by a bill in equity, which will decree a specific performance.

When the award is made in consequence of a reference by order of a court of equity, it seems to be a reasonable conclusion, from the tenor of all the cases on that subject, that a bill will generally lie for a specific performance: but when the submission is merely voluntary, without the interposition of a court of equity, such a bill will not lie, unless there has been some acquiescence in the award by the parties to the submission, or an agreement afterwards to have it executed.[4]

But if, in the case of such a submission, the plaintiff, who seeks by his bill to enforce the performance on the part of the defendant, has himself performed his part, a court of equity will decree a performance by

[1] Vid. B. R. H. 106, and 1 Bur. 278.

[2] 1 Term Rep. 266, denies 1 Atk. 58. to be law.

[3] 3 P. Wm. 189, 190.

[4] Dict. per Lord Hardwicke. 1 Atk. 74. (62) Bishop v. Webster, Abr. Eq. Ca. 51. Vid. 2 Rep. in Ch. 18 fo. ed. Semb. contra Id. 16.

the defendant,[4] even where the defendant shews that the plaintiff has put the submission bond in suit in a court of law; unless the award order something which it is against the constant course of a court of equity to enforce. Thus, where, among other things, it was charged by the bill that the father of the plaintiff and defendant was seised to him and his heirs male with the fee expectant of several lands in Henfield, and the plaintiff conceiving he had been seised in fee of the lands in Henfield, conveyed the same to the defendant and the heirs male of his body, leaving the fee in himself; that differences arising about the estate tail, Mr. Justice Croke, who had been chosen arbitrator between the plaintiff and the defendant, had awarded that the defendant should enjoy a former estate tail settled by their father, on him and his heirs male, and that the plaintiff should confirm the said estate tail at the charge of the defendant, and that the defendant should do no act to bar or discontinue the said estate tail, or the remainder of the plaintiff, without the consent of the latter, except it were for a jointure for his wife; the Lord Chancellor, though he held that the defendant should answer as to other parts of the award, declared that as it was absolutely against the constant course of the court to decree a perpetuity, or give any relief in that case, he would allow the defendant's demurrer as to this part of the bill.[5]

[4] Poole v. Pipe, 18 Car. 2. pr. Hyde Chancellor. 3 Rep. in Chanc. Chan. 20.

[5] Bishop v. Bishop, 1 Rep. in

On a submission by bond, it was awarded that the plaintiff, in the bill, should pay the defendant 900*l.* and seal a release to the defendant; that the defendant should assign several securities which he had from the plaintiff. The bill stated that the plaintiff had sold some lands to raise the 900*l.* expecting the defendant would accept it, as he had intimated he would, and tendered him the 900*l.* and a release executed according to the award: though there was no other execution on the part of the plaintiff, and though it was conceived, that the award was *extrajudicial, and not good in strictness of law*, yet the Lord Chancellor decreed that it should be specifically performed.[6]

On a bill brought to compel the defendant to make specific performance of an award, the case appeared to be thus: the plaintiff and defendant, who were brother and sister, had a dispute about the fee-simple of a small parcel of land under the father's will; they entered into a bond in the penalty of 200*l.* to stand to the award of arbitrators with respect to the dispute. The arbitrators awarded that the plaintiff should pay 10*l.* to the defendant on a particular day, and 30*l.* on a future day; and that on this the defendant should procure his wife to join with him in a fine and deed of uses, and thereby convey the premises to the plaintiff and her heirs. The plaintiff paid the defendant the 10*l.* on the day on which it was awarded to be paid; she afterwards tendered the remaining 30*l.* on the day on which that was awarded to be paid, and the defendant was willing to take the money, but would not execute the fine and

[6] Norton v. Mansell, 2 Vern. 24. S. C. 2 Rep. in Chan. 304.

deed of uses. On the opening of the case, the Master of the Rolls said he thought this a strange bill, for which he knew no precedent; and that the plaintiff must sue her bond. The plaintiff's counsel urged that the defendant, having accepted the 10*l.* had thereby undertaken to perform the award, and cited the case immediately preceding, where he said the court had decreed a specific performance, though the award had not been executed, and though, in strictness of law, it was void. The Master of the Rolls replied, that, in that case, the award not being good in law, there might be reason to decree a specific performance of it. But he desired to know what the defendant's counsel could say as to the defendant's having accepted part of the money. It was contended that it was sufficient, that, unless in very extraordinary circumstances, there was no instance of a bill being brought for a specific performance of an award: that besides, this was an unreasonable award, that the husband should procure his wife to join with him in a fine, which it might not be in his power to do; and therefore the court ought not to oblige him to it. His Honour answered that there were a hundred precedents, where, if the husband, for a valuable consideration, covenant that his wife shall join with him in a fine, the court had decreed that the husband should do it. In the present case the defendant, by his acceptance of part of the money awarded, had undertaken specifically to perform the award. His Honour therefore decreed, that on payment of the residue of the money awarded, the defendant should perform the award, and that he should pay costs; it being contrary to good conscience to take the money

awarded, and yet refuse to perform his part of the award.[7]

Though an award made in consequence of a voluntary reference be defective in form, or might have been at first avoided for uncertainty, yet if the parties have long acquiesced in it, and performed it, a court of equity will prevent its being afterwards disturbed by a suit at law.

In a bill filed in Chancery by one Scot against one Wray, it appeared that some differences having formerly arisen between one Roger Whittey and the defendant Wray, respecting certain lands, the decision was referred to arbitrators, who awarded that Whittey should have the lands; and there was a proviso in the award, that if any doubts should arise upon it, the arbitrators should expound them: the defendant Wray had found a defect in the award, which was, that it ordered Whittey to have the lands without saying that he and his heirs should have them, for which reason he insisted that Whittey should have them but for life; on which three of the four arbitrators then surviving, by a writing under their hands and seals, declared they meant that Whittey should have the lands to him and his heirs for ever, and that the latter words were left out by mistake: it appeared further, that Whittey, being in possession, had conveyed the lands to Scot, the present plaintiff, and his heirs; and that the defendant, claiming under an old deed of entail, sought to eject the plaintiff out of the premises.

The Chancellor, on perusal of the award, and of the explanation of it, and also of the depositions of the

[7] Hall v. Hardy, 3 P. Wms. 187.

two arbitrators who were alone surviving of the four, and which depositions corresponded with the former explanation, considering that the award had been long since made and executed on both sides, and adopting the opinion of two judges whom he had called to his assistance, declared, that notwithstanding it had been made on a voluntary reference, without the direction of the court, it ought in justice and equity to be ratified and confirmed, and he accordingly decreed that Scot and his heirs should enjoy the land against the defendant, and all claiming under him, according to the award and explanation.[8]

On the same principle the court refused on a bill of review to reverse a decree which had been made sixteen years, in consequence of a reference to settle the differences between the parties; though the plaintiff, in the bill of review, assigned for error, that the cause had been referred to four commissioners, and only three certified, and that the lease on which he now insisted was not then in issue, and that he had never assented to the certificate.[9]

If the plaintiff in the bill was limited to a time for the performance of his part, and does not perform it within that time, the defendant shall not be bound by the award; yet if, subsequently to the time, he has accepted of part performance, he shall be bound for so much as that is an equivalent for.

In a bill filed by Susan Ewes and William Reeve against Edward and William Blackwall, the circumstances of the case appeared to be these.

[8] Scot v. Wray, 1 Rep. in Chan. 46.

[9] Id. Goddard v. Goddard, 15 Car.

The plaintiff Reeve being seised of a certain manor and lands, in part freehold and part copyhold, mortgaged them to the defendants, on condition to have them reconveyed to the plaintiff Reeve and his heirs, on payment of some money due to them: some differences afterwards arose between the parties about the amount of those sums, and suits being commenced by the plaintiffs for a new redemption, a reference was proposed, and accordingly, by agreement, all matters were referred to two persons, who made an award that Reeve should pay to Edward Blackwall, as due to him, the sum of 6543*l.* 13*s.* 9*d.* and to William Blackwall 3500*l.* as due to him: but that if Reeve should procure bonds or bills under hand and seal, by which the said Edward Blackwall stood bound to any person or persons for his own just debts, which with interest should amount to the debts aforesaid, and the said bonds and bills should be delivered up to the said Edward within five weeks from the date of the award, then the defendants should accept them in full discharge of their debts, and then reconvey to Reeve, his heirs and assigns, all the lands which were by him mortgaged to them, discharged of all incumbrances incurred by them, or any claiming under them, with all deeds and evidences concerning the same, and discharge all bonds and securities whatever, which they had against Reeve or his estate; but if Reeve should fail in the performance of what was awarded, then the defendants should have the full benefit of their securities for the whole money stated to be due to them as before mentioned.

The bill further stated, that within the time limited for payment of the said money, there was a great quantity of grass fit to be cut off the estate, which it

was agreed the defendant Edward should cause to be cut and made into hay, and that if the plaintiff Reeve performed the award, and paid the money and charges for cutting the grass, and making it into hay, then he should have it to his own use: that in part performance of this award, the plaintiff Reeve borrowed of the other plaintiff Susan Ewes, the sum of 700*l.* and paid the same to the defendant Edward Blackwall, by the hands of Henry Johnson, Esq. but not within the five weeks from the date of the award; and farther paid to him, by the same hand, the sum of 6543*l.* by delivering up several bonds, in which Edward stood bound to several persons for his own debts; and that in consequence of this the said Edward and the plaintiff Reeve conveyed the lands in the bill mentioned, or the greatest part of them, to Henry Johnson and his heirs.

That, in further pursuance of the award, the plaintiff Reeve paid the defendants, or one of them, in money or in bonds, or statutes, in which the said Edward and John Blackwall, or one of them, were bound, the sum of 2058*l.* 15*s.* 6*d.* part of the said 3500*l.* appointed to be paid by the award to the said Edward Blackwall, for the debt of the other defendant William Blackwall, which they had accepted, and the plaintiff had tendered and offered to deliver up some other bonds and securities, in which the said Edward stood bound for his own debts, and which amounted to the residue of the said sum of 3500*l.* and required the defendant to accept the same, and that the said William Blackwall should surrender the copyhold lands to the plaintiff Susan Ewes and her heirs, and convey the freehold lands to the plaintiff Reeve and his heirs, discharged of all incum-

brances, and perform the award specifically, and account for the value of the hay.

On hearing, the court dismissed the bill as to the hay, and decreed that the money paid and "accepted" by bonds or otherwise, was well paid, and should go towards the satisfaction of the debt due to William Blackwall, as well on bond as on mortgage, so far as the same would reach; and that the award, in the bill set forth, not being performed by the plaintiff within the time, ought not to be conclusive and binding to the said William Blackwall, to cut off any part of his just debt, and that therefore the award should stand dissolved from that time. That the master should compute what was due to William Blackwall for principal and interest by bond or mortgage, beyond what had been already paid by bonds or in money, and that on payment of that balance, at a time to be appointed by the master, the defendant should reconvey and surrender the mortgaged premises to the plaintiff, or to his appointment, discharged of all incumbrances, as the master should direct, and then deliver up the mortgages and bonds, and other writings, and in default of payment the defendants should take the benefit of their securities.[1]

However far a court of equity may assist a plaintiff to procure the execution of an award, it will not compel a defendant to discover a breach, by which he may charge himself with the penalty of a submission bond.[2] (*o*)

[1] Susan Ewes and Wm. Reeve v. Ed. and Wm. Blackwall, Rep. temp. Finch. 22.

[2] Bishop v. Bishop. 25 Car. 1 Rep. in Ch.

(*o*) See pp. following.

*Of the remedy to compel performance, under the rule of court in Pennsylvania.*

(*o*) The act of assembly in very explicit terms entitles the plaintiff to a judgment upon the report of referees, if it be a report of *money* in his favour: and if the report be of *money* in favour of the defendant, the latter is entitled to a scire facias, by which he becomes the plaintiff, and obtains a judgment in the usual way.

The clause which imparts this remedy has relation to the first section of the act, whereby a jury is authorised in certain cases, in which the defendant under the plea of payment, but by virtue of a *set-off*, turns the balance against the plaintiff, to give a verdict for the former, certifying at the same time to the court, how much the plaintiff is indebted to him: the defendant may then proceed by scire facias upon this certificate. It is, however, only in cases of actual defalcation or set-off that the jury possess this power; and the remedy by scire facias upon an award, seems to be intended for the same case; that is, where the defendant by his *account* turns the balance against the plaintiff, and the referees award a sum of money accordingly. It is indeed the spirit of the whole law to provide only for cases of *mutual* dealings, and to prevent circuity of action in all such cases, by converting the defendant into a plaintiff, with the remedy of a scire facias. But it has been seen in a prior note, that the benefit of the kind of arbitration introduced by this act, has been carried far beyond these cases; and supposing this to have been judicially right, it is manifestly proper to give the remedy introduced by the act, an equal extent if it can apply. This is *probably* the practice; and the court would perhaps allow a scire facias in every case in which money was awarded to the defendant, though it were even in an action of trespass for an assault and battery. It is said, *probably* this is the practice; for it is not known that the question was ever made; and it is a matter of perfect notoriety, and of infinite inconvenience to the bar of Pennsylvania, that they are compelled to grope for the practice of the state courts, among the imperfect and sometimes conflicting recollections of experienced men.

It may be stated then, as the law upon this subject, that if the referees, by a report to which there are no exceptions, award *money*

*to the plaintiff*, he may compel performance by entering a judgment and issuing an execution. If the referees award *money to the defendant*, he takes a scire facias which leads to the same result. If they award generally for the defendant, that nothing is due, he signs a judgment as upon a verdict of the same kind.

There is also a case in which an award *not* of money, is enforced by a judgment and execution; and that is the case of an award in *ejectment*.

Thus far the means of compelling the performance of an award are simple, and in perfect harmony with the other parts of the system, in which awards are placed upon the same footing with *verdicts*. But here that harmony must be interrupted, if any awards except of the description above-mentioned, are valid under this act; for if such awards are enforced at all, they must be enforced by means never adopted to enforce a verdict.

Under the rule of court, it is the constant practice to refer *trover*, *trespass quare clausum fregit*, *replevin*, &c. In trespass quare clausum fregit, with the plea of liberum tenementum, how is the award to be enforced if the referees direct a line to be run between the parties so as to leave the disputed land in possession of the plaintiff? Such an award has been confirmed by the court. How is an award to be enforced which orders money to be paid on one side, and conveyances of land on the other? Such an award has been confirmed by the court. And, in general, how is any award under this rule of court to be enforced, if it orders one thing to be done by the plaintiff, and another by defendant? There is in all these cases a remedy by *attachment*; but it is a remedy entirely different from that pointed out by the law; one which, as far as the printed reports go, has never been adopted, and the right of adopting which, although in one instance it has been asserted by the court, in another instance has been denied, and in a third instance, an objection to the use of it was accompanied by the declaration of a very experienced lawyer, that it had never been known to the Pennsylvania practice. The question amounts to this, whether a report of referees under the statute rule, is in any case valid, where the court cannot grant a judgment and execution upon it, either in the action referred, or in a scire facias brought by the defendant. For if a judgment cannot be entered upon a report which the court confirms,

confirms, either the confirmation amounts to nothing, or an attachment seems the only remedy for the party in that suit. Whether he may have an action upon the award, is a distinct question.

The first case reported upon this head, is that of *Buckley* v. *Durant*, in the Common Pleas of Philadelphia county, June Term, 1785. It was an action of trover, with the general issue. The referees reported, "that plaintiff pay to defendant 3*l.* upon which pay-"ment being made, defendant to restore to plaintiff certain articles, "for trover and conversion of which the action was brought." The defendant's counsel took three exceptions to this report. 1st. "The act of assembly giving reference by rule of court in actions depending, puts the report of referees on the same footing precisely with the verdict of a jury. Now in trover, a verdict can never be for the restoration of the specifick chattels, but for damages only, and such a verdict would be error; therefore he inferred the same law of a report." The second exception is not material here. 3d. "A report should be such a one as that the court may give judgment and award execution thereon. Judgment cannot be for plaintiff and defendant on one issue, and this report gives something to each. It is a report on both sides. Judgment and execution can be only for one." On a former argument of this cause, the third exception was combated by an observation, that even if judgment could not be entered on the report according to the common forms, yet, the reference being made under the eye of the court, they would grant an attachment to compel compliance with the report; and a case of *Ralston* v. *Stewart* was mentioned, where the Supreme Court, it was said, established this point. Time had been given to the plaintiff's counsel to search for notes of this case; and no note being now produced, the defendant's counsel said, that although he was concerned in that cause with the gentleman who cited it, yet he could not remember that any such point had been adjudged, and contended that the act of assembly gave no such authority, and that no instance of such an attachment had ever been known in practice.

The *first* exception is, however, as fatal to the attachment as the *third;* for if referees can award nothing but what a jury can give by a verdict

a verdict in the same action, it follows that an attachment can never be required; the same means which enforce a verdict, being completely applicable to an award that corresponds with a verdict. It in fact includes the *third* exception; for a report, which gives that and that only which a verdict can give in the same action, must always be such as may be enforced by a judgment and execution. No opinion was pronounced upon these exceptions, in order that the parties might accommodate the matter by a new reference; but the court, adds the reporter, inclined *strongly* to be of opinion with the defendant's counsel, *particularly* on the first point. 1 Dall. 129.

In the next reported case, a principle was adopted by the Supreme Court, which confirms the first exception in *Buckley* v. *Durant;* namely, that a report is placed by the act of assembly upon the same footing with a verdict, and that what would be a good exception to a verdict, is a good exception to a report of referees. It is the case of *Williams* v. *Craig*, July Term, 1788. 1 Dall. 313.

On the same side of the question also is a clause of the court's opinion in *Dixon's lessee* v. *Morehead*, Common Pleas of Westmoreland county, June Term, 1794. Our act of assembly in cases of mutual accounts did not copy the statute of William, says the President, but introduced into Pennsylvania a fourth species of awards, which when approved by the court is to be proceeded on as a verdict by judgment and then by execution, or scire facias as the case may be, *not by attachment.* Addison's Rep. 225.

But in the two last cases, the question of attachment did not come before the court, and in the first in which it was incidentally mentioned, it was not followed by any judgment, but merely by the inclination of the court to a certain point in the cause, which by inference excluded the attachment.

In two other cases, a report of referees to which the first and third exceptions in *Buckley* v. *Durant* were clearly applicable, was nevertheless confirmed by the court; and in a third, the question whether an attachment could or could not issue to enforce an award, came directly before the court and was decided affirmatively.

The case of *Dunning* v. *Caruthers* was thus: A dispute having arisen between the parties as to the title to certain land which connected

nected their farms, *Dunning* brought an action of trespass quare clausum fregit against *Caruthers*, to which the latter put in the plea of liberum tenementum, and the matter in dispute was referred under a rule of court. The referees reported that a line should be run between the parties so as to leave the disputed land in possession of the plaintiff; and this award was confirmed by the court. Cited in *Calhoun's lessee* v. *Dunning*, 4 Dall. 120. A verdict of the same kind would no doubt have been bad, and so a *judgment* upon this award; since in this action, even where the title comes in question by the pleadings, nothing is recovered but damages for the wrong committed. 3 Bl. Comm. 214.

The case of *Levezey & al.* v. *Gorgas & al.* in the Supreme Court, is still stronger. It was an action of trespass against the defendants, who were the owners of a water grist mill on a certain creek, for having raised their dam so high as to overflow and damage the plaintiff's mill, which was higher up on the same stream. The following submission was made a rule of court. "All matters in variance between the parties are referred to A. B. C. and D. who shall have full power to award whether any and what sum shall be paid to the plaintiff by the defendant, and *vice versa*, to settle their respective claims to the waters of the Wisahickon creek, by fixing what shall be the height of the defendant's dam, and whether any alterations shall be made therein, and to direct articles to be executed accordingly." The referees reported in substance as follows: 1. That the defendants might raise their dam to the height of a certain mark in a rock near their mill; but if they raised it higher, the plaintiffs might give them a written notice to reduce it to its proper level; and if they neglected to reduce it for thirty days after notice, the plaintiffs might summon three freeholders to examine the dam, who, if they found the plaintiffs injured, should give the like notice; and if the defendants neglected for thirty days more, plaintiffs might enter upon the dam, and prostrate it. 2. That defendants, their assigns, &c. holding said mill, should annually pay to plaintiffs 10*l.*; and should also pay (on a certain day) 50*l.* in full satisfaction of all demands against defendants, on account of said mill dam. 3. That the parties should execute proper deeds, &c. to carry into effect the award, and should divide the costs. On the

21st

21st March 1796, the report of referees was read and confirmed, and judgment *nisi*. On the 22d March, exceptions to the report were filed; but after *argument* the report of referees and judgment were *confirmed*. The exceptions filed had relation merely to the conduct of the referees; whether, as its being an award of what a jury could not give by a verdict appeared on the face of the report, the exception was taken in argument without being filed, is not known. It would however have been a singular exception, considering what the submission was: but then the question would be, did the submission alter the case. If it did not, then the confirmation of the report after argument is a complete answer to the first and third exception in *Buckley* v. *Durant*. If it did, then the whole question is a question about terms; for if an award, totally unlike a verdict in the same cause, will nevertheless be confirmed by the court where the submission authorizes it, the only question will be, whether the award is within the submission, and if it be, it is of no consequence whether it be or be not like a verdict, or whether a judgment may be entered and execution awarded thereupon. By the above statement it does in fact appear, as if a conditional judgment had been entered upon the *whole* award at the time it was filed, and afterwards, that final judgment upon the *whole* had been rendered by the court. Whether this was merely a short entry upon the docket, or whether the record was so made up at large, does not appear; it was probably the former case; for upon a writ of error being brought upon the judgment of the Supreme Court, the counsel for the defendant in error argued that the judgment of the Supreme Court was entered only upon that part of the award which directed the payment of money, but that upon the other two objects of the report, there could be no judgment, and that they remained in the record as rules of court to be enforced by attachment. The court of errors, however, inasmuch as the award was confirmed generally by the Supreme Court, reversed the judgment; not for the cause at this time under consideration, no such exception being taken in the higher court, but solely because the referees had erected a tribunal unknown to the laws, to whom they had delegated their power for the adjustment of future disputes between the parties. 4 Dall. 71.

In the third case before alluded to, the circumstances were these. To a report of referees under a rule of court, it was objected, among other things, that they awarded money to be paid by the defendant

defendant on one side, and the making conveyances of land and a lot of ground, and taking up a bond and mortgage in the loan-office by the plaintiff, on the other side. The ground of the objection was, that the court could not do complete justice on both sides, as an execution might issue for the money against the defendant, and the plaintiff could not be compelled by the court to perform his part; at least that the remedies were not the same on both sides, namely by *execution*. In delivering the opinion of the court upon this objection, *President* SHIPPEN says, "Where a report of referees awards money to be paid on one side, and certain other things to be done on the other, if the court cannot enforce both, they will certainly enforce neither. In the present case, the question will be, whether they can oblige the plaintiff to perform his part of the award? They certainly cannot do it by *execution;* but if they can do it by *attachment*, the remedies are mutual, though not by the same kind of process. That an attachment will lie for a contempt in not performing an award of referees, appears clearly to have been agreeable to the common law, prior to the statute of 9 & 10 W. 3. which is declared by the judges, and appears from a perusal of the act itself, to have been made only to put agreements to refer cases never instituted in court, upon the same footing with causes already in court, and to be declaratory of what the law was in the latter cases.

"I have inspected the record in the case of *Stuart* v. *Ralston*, and the judgment in that case seems decisive of the present question. There the award was that money should be paid by defendant to the plaintiff, and that the plaintiff should at a future time, when certain proceeds of pot-ash should come to his hands, and when a certain debt should be received, pay the amount of one half of them to the defendant. The objection with regard to the time of the plaintiff's performing his part of the award, was much stronger than in the present case; which requires that it shall be done within five days after payment of the money.

"In all cases of this kind, the court will exercise their equitable powers in such a manner as not to suffer either party to elude the performance of their part of the award. If, for instance, execution should be taken out by the plaintiff against the defendant, and any well

well grounded suspicions should appear, that the plaintiff was contriving by flight or otherwise to avoid complying with his part, the court would order the money to be lodged in court till the plaintiff should comply; or might impose such other terms upon him as should appear necessary to oblige a compliance.

"As to the objection that the award is impossible to be complied with, the defendant himself having taken up the loan-office security, which was directed by the referees to be done by the plaintiff, it is evident from the time of its being done, that it was with a view of making the present objection; it being done two days after the referees had agreed upon their report, though before the actual signing of it. This however is no legal objection, because if any part of an award be impossible to be performed, it appears by a case in *Salkeld* 83. that the court will refuse an *attachment* for that part. Yet as the plaintiff in the present case, would receive the benefit of what the defendant has done in taking up the security, we should certainly think it equitable that he should abate so much out of the money to be recovered, and upon application would oblige him to do it, and in general see that the report was carried into execution *in all its parts*, agreeably to the intent of the referees and the justice of the case. We therefore *confirm* the report." *Kunckle* v. *Kunckle*, Common Pleas of December Term, 1788. 1 Dall. 364.

It is upon these cases that the question rests; and as in no reported case has it been *expressly* adjudged that an attachment *cannot* issue to enforce performance of a report of referees, and as *Kunckle* v. *Kunckle* is subsequent in point of time to *Buckley* v. *Durant*, and is also confirmed according to *President* SHIPPEN, by *Stuart* v. *Ralston* in the Supreme Court, the weight of the cases may be considered in favour of the attachment, and *that* also may be stated as a means of compelling the performance of an award, where a judgment and execution cannot be granted upon it.

It would perhaps be improper to lay much stress upon the objection to this remedy, that it is not authorized by the act of assembly; for if by the liberal construction of that act, the remedy it prescribes has become incompetent to the distribution of perfect justice between the parties, the provision of a new remedy follows as a consequence from the extension of the rule to new cases.

# CHAPTER VII.

## THE MEANS OF PROCURING RELIEF AGAINST AN AWARD WHEN IMPROPERLY MADE.

WHERE the objection taken to the award is, that it is contrary to some of those rules, which the law has prescribed to be observed in the constitution of an award, that objection may be taken when the award is put in suit. This is equally applicable to the case of a submission by the mere act of the parties, and to that where the mere act of the parties is accompanied by the interposition of a court. And where the object is merely to set aside an award from legal objections appearing on the face of it, this can be effected *only* in a court of law: a court of equity will not in such a case lend its assistance.[3]

But when the submission is by the mere act of the parties, then, in order to be relieved against the award on account of any extrinsic circumstances, the defendant cannot make these a defence to the action on the award or on the submission bond: he cannot give in evidence

[3] Vid. Champion v. Wenham, Ambl. 245.

any thing to impeach the conduct of the arbitrators; the award is a determination of judges chosen by the act of the party himself, and nothing extrinsic to that judgment can be offered in evidence to overturn it; if such evidence were admitted, the plaintiff would come entirely unprepared: to support his action he has only to prove the submission and the award; the corruption or partiality of the arbitrators, it is said, may be wholly unknown to him; it concerns only the arbitrators themselves: there is no precedent at law of any *writ* to set aside an award; corruption or partiality has never been pleaded, and the statute of William the third shews that an award at law must stand, where there is no objection to the terms of it; for, as to awards made under that statute, it says they must stand, unless controverted and set aside in two terms.[4]

In this respect the Roman law is somewhat different from ours; for though it provides no direct method, by which the party against whom the award is made can impeach the conduct of the arbitrators, yet by a rescript of Antoninus, it is provided that the enmity of the arbitrators to the defendant may be set up as a defence against the plaintiff's action for the penalty expressed in the submission.[5]

[4] Vid. 1 Saund. 327. 2 Vesey, 315. Wills v. Maccormick, C. B. 2 Wils. 149.

[5] Cum quidam arbiter ex aliis causis inimicus manifestè apparuisset, testationibus etiam conventus, *ne sententiam diceret*, nihilominus nullo cogente dicere perseverasset: libello cujusdam id querentis, Imperator Antoninus subscripsit, *posse eum uti doli mali exceptione*. Et idem cum a judice consuleretur apud quem pœna petebatur, rescripsit, *etiamsi appellari non potest, doli mali exceptionem in pœnæ petitione obstaturam*. Per hanc ergo exceptionem quædem appellandi species est, cum liceat retractare de sententiâ arbitri.—Ff. l. 4. t. 8. s. 32. n. 14.

With us, in such a case, the only relief is in equity, which often sets aside awards, and gives that kind of relief, which seems naturally to arise out of the circumstances; as by directing accounts, or granting injunctions to stay all legal proceedings which had been pursued, on the foundation of the award being good. Though bills of this sort are received with some prejudice, because arbitrators are judges of the party's own nomination, yet, if on partiality a court of equity should not relieve, arbitrators would have too great a power, and might abuse it from corrupt motives.[6]

In a bill filed to have an award set aside, it was alleged by the plaintiff, that he had been arrested at the suit of the defendant, on which both parties submitted to two arbitrators, and on the event of their not agreeing, then to an umpire; on the nonagreement of the arbitrators, the umpire awarded 36*l.* to be paid by the plaintiff in the bill to the defendant, and as was suggested in the bill, without hearing the plaintiff. The defendant, in his answer, set forth that he held lands by lease of the plaintiff; that being indebted to several persons, he was persuaded by the plaintiff, his landlord, to make over his goods to him, and deliver him up the lease, in order to protect it against his creditors; but the plaintiff abusing his trust, had insisted the goods were his own by an absolute surrender; that this being the greatest subject of difference between them, it was referred to arbitration, and all this matter appearing before the arbitrators in the presence of the umpire, the latter had made the award. It appeared on the proofs

[6] 2 Vesey, 315. 2 Wils. 149.

in the cause that the plaintiff had goods of the defendant only to the amount of 7*l.* 10*s.* but that he might have been heard, if he had pleased. The court thought the award ought not to be set aside for any supposed hardship in the case, as the umpire had exercised his judgment in the recompence he had given to the defendant for the injury he had sustained, and the bill was dismissed with costs.[7]

The same rule applies to the case of an award made in consequence of a reference at *nisi prius;* for to a court of equity, that is nothing more than a voluntary reference. Thus, where the plaintiff tenant for life, remainder in tail to his first, &c. sons, remainder to the defendant in tail, had committed waste for which the defendant had brought his action, and at *nisi prius*, by consent of the parties, the matter was referred to two of the jury, under a proviso that they should make their award by Michaelmas, otherwise that an umpire should decide: no award was made by the arbitrators, but the umpire gave the plaintiff in the action, the defendant in the bill, 384*l.* damages. The bill was exhibited to pray relief; 1. Against these damages, as excessive; 2. For misconduct in the umpire, because he had declared before the umpirage made, that he would not meddle in the matter, and afterwards that he had made it for fear he should be arrested, from whence the plaintiff's counsel inferred that he had been menaced; and lastly, because after the submission the plaintiff had repaired the premises, and proved repairs done, and that 40*s.* would complete them.

[7] Waller v. King, 2 pt. Ca. in Law and Eq. 63, 64. Vid. Geenhill v. Church, 3 Rep. in Ch. 49, to the same point.

The defendant insisted that the umpirage ought not to be set aside without fraud or partiality proved; that the time when the umpire had said he would not meddle in the business, was in August, before the time he was to make his umpirage, as the truth really was; and that the plaintiff had notice given him by the umpire to attend, which he did not, so that the umpire had no notice of the repairs, and if he had, that was not material to avoid the award.[8] In another report of the same case,[9] it appears, that the tenant for life had no issue; that the value of the estate was 70*l.* per annum, and that the tenant for life, who had suffered some mills and houses, of which the estate consisted, to go greatly out of repair, had, before the umpirage made, repaired all the waste to within 40*s.* and forbidden the arbitrators to make any award, and had also forbidden the umpire, who notwithstanding made the umpirage as before stated: one ground of impeaching the umpirage was that the umpire had refused to hear the plaintiff; but of that no other proof was given than that he had said, the plaintiff might bring what witnesses he would, he would not believe them, because he knew the premises himself, and was well satisfied about the value of the repairs. With respect to the outrageousness of the damages, it was said, that the defendant had but a remote remainder after an estate tail, and yet he had as much given him, as if he had been to come immediately to the estate: it was answered, that the damages were not to be measured by

[8] Brown v. Brown, 1 Ca. Ch. 140.

[9] 1 Vern. 157.

the quantity of the tenant's estate, but by the injury done to the inheritance; that were it necessary to consider the excessiveness of the damages, they might have been given for the treble value; and that no fraud or collusion being proved, the court could not set the award aside, unless there were a manifest error in the body of the award.

In bills to have an award set aside for corruption or partiality, it is usual to make the arbitrators defendants, unless the parties be restricted from so doing by the terms of the submission;[1] the arbitrators, it is said, may plead the award in bar, but they must support their plea, by shewing themselves impartial, or the court will give a party a remedy, by making them pay costs.[2]

But in order to avoid the inconvenience of having a bill filed against them, it is not unusual for the arbitrators to insist on its being made a condition of their acceptance of the office, that no bill in equity shall be brought against them: in which case, if they are made parties to a bill for setting aside the award, they may apply to have their names struck out, which will be immediately ordered.[3]

A bill will not lie to compel the arbitrator to discover the grounds on which he made his award; it is unreasonable that he should be put to so much trouble and expence: if there be any palpable mistake made by the arbitrator, or a miscalculation in an account that had been laid before him, the party aggrieved may

[1] Ca. temp. Finch, 131.
[2] 2 Atk. 396, (412.)
[3] Id. 396, 397, (412, 413.)

bring his bill against the party, in whose favour the award is made, to have it rectified.[4] (*p*)

When a case is referred at *nisi prius*, it is usual to insert in the order of reference a condition that the parties shall file no bill in equity, either against the arbitrators or against each other: if notwithstanding this condition, a bill in equity be filed, the plaintiff incurs the danger of being attached for a contempt, by the

[4] 3 Atk. 644. (609.)

(*p*) Nothing however is more usual than to examine arbitrators under a rule of reference in Pennsylvania, for the purpose of ascertaining the grounds on which they have made their award; and without a power in the court to compel this disclosure, many of those mistakes which according to established construction vitiate this kind of award, must escape detection from a want of chancery jurisdiction in the state courts.

But where an award is vague and uncertain upon the face of it, no instance has occurred in which the arbitrators have been examined to explain this uncertainty, although it was evidently in their power, and by admitting their explanation the uncertainty would be at an end. The award in such a case is bad, unless by a reference to something else the defect is obviated.

In *Young* v. *Reuben*, 1 Dall. 119. The referees reported "that the sum of 75*l.* was due (to the plaintiff) on the 3d of March last, with interest for the same." The time mentioned was several months before the meeting of the referees, and the court set the report aside for the uncertainty, as there might have been a sum due

court of which the order of reference was made a rule: but it is in the discretion of that court to grant an attachment or not according to the circumstances of the case: and in a case which lately occurred in the common pleas, it was actually refused.[s]

The usual insertion of this condition in the order of reference at *nisi prius*, has been considered as a tacit admission that a court of equity has a discretion to entertain a bill for setting aside an award for partiality or corruption, though made under such a reference,

[s] Burton v. Petrie, cited by Lord Loughborough. 2 Vez. Junr. 543.

due on the 3d of March, and nothing due at the time of making the report. There was perhaps in this case, a sufficiently strong presumption that the money was due at the time of the report, and that the 3d of March was the day fixed for commencing the interest; but the arbitrators were not examined to explain it, which undoubtedly they could have done.

In *Brown* v. *Scott, et al.* 1 Dall. 145, where there were five actions and as many rules to refer them to the same arbitrators, one report was made awarding a gross sum to be paid by defendant to plaintiff. It was objected that it did not appear what was due in each action, and that the court could not apportion the sums. It was answered that the particular agreement to refer amounted to a consolidation of the actions, *or* that the court might *interrogate* the referees and divide the sum among the several suits. A majority of the court thought the actions were consolidated, and so the report certain; but President *Shippen* thought otherwise. Yet the proposition

and though no application for redress had previously been made to a court of law, and refused: on this principle Lord Loughborough overruled a general demurrer to a bill filed to set aside an award for partiality and corruption, made under an order of reference at *nisi prius* in the court of King's Bench, though no application had been made to that court, and though two years had elapsed from the time when the award was made, before the filing of the bill.[6]—And where an application has been made to the court of law, but

[6] Lonsdale v. Littledale, 2 155, (162.) Bunb. 265. 1 Bar-Vez. Junr. 451. vid. 2 Atk. nard. 152.

proposition to interrogate the arbitrators was not listened to, although they were in court, and examined to other points, and their explanation would have made the question of consolidation unnecessary.

So in *Hart et al.* v. *James*, 1 Dall. 355, two actions, there were judgments and a reference to ascertain the quantum due in each. The arbitrators awarded a gross sum as in *Brown* v. *Scott*, including what was due in both actions. They were afterwards prevailed upon, without notice to defendant, to file an explanatory certificate, apportioning the sum between the two actions. The court was of opinion that the *first* report could not be maintained, and that the explanation which was called a supplementary report, was irregular.

And in *Kingston* v. *Kincaid, et al.* Circuit Court U. S. for Pennsylvania, April sessions 1806, Judge Washington said he had examined all the printed cases adjudged in the superiour courts of this state upon the subject of these reports made under rules of court, and could not find a single instance in which the referees had been called upon to explain what upon the face of the award appeared vague and uncertain.

2 Z

without success, the party may still have recourse to a court of equity against partiality and corruption: the proceeding under the authority of the court of law may be altogether incompetent; for that which would subvert the award, may arise out of the answer in equity only; where the mode of compelling a discovery in answer to pointed interrogatories has much the advantage of that by affidavits in a court of law.[7]

Where the submission is according to the statute, and application has been made in the court of which the submission is a rule, for an attachment for nonperformance, by one party, and to have the award set aside, by the other; and both applications have been unsuccessful, then a bill will lie to obtain relief against the corruption or partiality of the arbitrators.

The case of Mr. Ward of Hackney is a very remarkable instance of this kind. It came twice before the court of Chancery; it was a bill to set aside an award made by Walker and Floyd, two arbitrators out of three, in consequence of a reference to put an end to a cause of long standing, in which an account was before a master: the submission was made a rule of the court of King's Bench. The party, against whom the award was made, obtained a rule to shew cause, why it should not be set aside, on account of partiality and misbehaviour in the arbitrators. On shewing cause, the court was divided, so that the award could not be set aside. The other party afterwards moved for an attachment for not performing the award, the court

[7] Vid. all the authorities last before cited.

was still equally divided, and of course no attachment was granted. The party in whose favour the award was made, having no advantage from the submission being made a rule of court, brought a common action on the submission-bond. Ward, the party against whom the award was made and the defendant in the action, filed his bill in Chancery merely to be relieved against the award, only praying general relief. The defendant to the bill, by his answer, insisted that the King's Bench had determined, and therefore the award ought not to be set aside. The cause was heard by Lord Macclesfield,[a] who was a little doubtful on account of the proceedings in the King's Bench, as the award was by virtue of a submission by rule of that court, within the act of Parliament; he therefore hesitated whether he should give relief, as the whole matter was subject to the jurisdiction of a court of common law, who had inquired into it, and were not of opinion to set it aside; all he did at first, therefore, was to refer it to the master to state what the King's Bench had done; and the master stated the case as above.—Lord Macclesfield was then of opinion that the King's Bench had not determined either way, not having thought fit to set aside or to confirm the award, because they had refused the only process to carry it into execution; and therefore he held, with reason according to the opinion of Lord Hardwicke, that the case should be considered as an award by submission, without a rule of court, and that if a court of common law, which had this summary jurisdiction, refused to exercise it, and left the party on

[a] 21st April, 1719.

one side to his action, it left the other to seek relief by a bill in equity.[9]

How far a court of equity will interpose to grant relief against partiality or corruption in the case of an award made in pursuance of the statute, either when no application to set the award aside on that account has been made to the court of which the submission has been made a rule, within the time limited by the statute, or when such application has been made without success, but no application has been made on the other side for an attachment, appears to have been till lately by no means a settled point.

The words of the statute so far as they affect this question are these: "in case of disobedience to such arbitration or umpirage, the party neglecting or refusing to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court, and the court on motion shall issue process accordingly, which process shall not be stopped or delayed in its execution by any order, rule, command, or process of any court, either of law or equity, unless it shall be made appear on oath to *such* court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means. And any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of no effect, and accordingly be set aside by any court of law or equity,

[9] Ward v. Periam, cited 2 Atk. 216, 317. 155, (162,) 396, (412.) 2 Vesey,

so as complaint of such corruption or undue practice be made in the court where the rule is made for submission to such arbitration or umpirage, before the last day of the next term after such arbitration or umpirage made and published to the parties; any thing in this act contained, to the contrary notwithstanding."

I find but one case reported till very lately relative to this question, and that is by no means conclusive or satisfactory. It is reported in two books, with a little variation: in the one,[1] it appears that an application had been made without success in the court of King's Bench, to have the award set aside, before the filing of the bill; in the other,[2] it is said that no application had been made to that court.

The bill was filed to have satisfaction on a note of hand for 3184*l.* given to one Richardson by Cambel, one of the defendants to the bill, and party to the submission, which had come to the hands of the plaintiffs by mesne assignments, and to set aside an award which ordered that note to be delivered up by the plaintiffs: the bill charged that the note had never been produced to the umpire; that one of the plaintiffs informed the umpire that Alardice, the other plaintiff, was gone to Scotland, to inquire whether the defendant Cambel had paid this note to several shipowners there, as he pretended; that Alardice was the only person who knew any thing of the affair, and therefore the other plaintiff desired the umpire to wait for his return, which he promised to do, but afterwards made the umpirage *before* Alardice's return; that both the umpire

[1] 1 Barnard. K. B. 75, 152. [2] Bunb. 265.

and Cambel promised the award should be only conditional, and that Alardice should be heard after his return from Scotland: and there were other charges in the bill of undue practice in making the award.—One report[3] states, that the defendants pleaded the submission to the award, the election of the umpire, and the award within the time; that the submission had been made a rule of the court of King's Bench; that there had been no application made to that court according to the statute, and therefore that all other courts were now precluded from taking cognizance of the cause; the other report[4] states, that Cambel pleaded that the umpire made an absolute and impartial award, according to the best of Cambel's belief, but that it had been delivered above two terms before the filing of the bill, so that the plaintiffs were now too late to take his exceptions; that the umpire put in an answer to the bill in a particular manner, and set it forth with a great many circumstances.—By both reports it appears that the defendants gave no answers to the express charges in the bill, verifying their plea only in general terms, and denying combination.

The principal question being, whether courts of equity, as well as the court of law, of which the submission had been made a rule, were not confined by the statute to the time thereby prescribed, for the allowance of exceptions to the award; the Chief Baron is reported to have been of opinion that they were not. He observed that before this statute, agreements made in any cause depending in courts of law, and after-

[3] Bunb. [4] Barnard.

wards made rules of those courts, had equally the advantage of that speedy remedy, which now all extra-judicial agreements may have on this act of Parliament. They were, however, open to the inspection of courts of equity, who might examine into any circumstances of fraud or misbehaviour: as the law then stood, if courts of law had enforced such agreements by attachments, for proper reasons courts of equity might have granted injunctions. This statute had indeed confined the courts of equity in cases of submissions under the provisions of it; it said in general that no injunction should lie upon such attachment: but a bill to discover whether there was partiality or not, he said, was left as it was before, and would not affect the proceedings on the attachment. On the whole, he thought the plea ought to be overruled; but that if the rest of the Barons thought it as well that the plea should stand for an answer, he would not oppose it. Hale and Comyns agreed with the Chief Baron as to the principal point; Carter differed from them: but they all agreed that the plea should stand for an answer, with liberty to except.[5]

In a late case Lord Chancellor Loughborough intimated an opinion that the jurisdiction of a court of equity was not excluded by a reference under the statute; and said it had never been so received.[6] And I suppose his Lordship, had the question been directly before him, would have decided that the jurisdiction of a court of equity is in all cases as little excluded by a

[5] Alardice v. Cambel in the Exchequer. 1 Barnard. 75, 152. Bunb. 265.

[6] Lord Londsdale v. Littledale, 2 Vez. Junr. 453.

submission under the statute, as by a reference at *nisi prius*.

When the practice of referring causes at *nisi prius* was but new, and the courts had just overcome their reluctance to enforce, by attachment, awards made in consequence of such references; it was a matter of some difficulty, to procure relief against the corruption or misconduct of the arbitrators. Holt is reported to have maintained, with even indecent warmth, that an award should not be impeached for any such misconduct, and for no better reason than that it was contrary to all practice within his experience; which was that the integrity of the arbitrators, whom the parties, by consent, had chosen to be their judges, should never be arraigned any more than the integrity of any other judge. The other three judges,[7] however, could not adopt the sentiments of the Chief with respect to this unimpeachable integrity of arbitrators; they supposed it possible, that they might be influenced by corrupt motives, and said, it was abominable to countenance them in such proceedings, and they ought to be punished for having abused the office of a judge. Accordingly an application being made to have an award set aside, which had been made by arbitrators, chosen by the consent of parties, under a rule of *nisi prius*, which had afterwards been made a rule of the court of King's Bench, and affidavits being produced of the misconduct of the arbitrators, they were ordered to attend, and all their proceedings being examined, one[8]

[7] Powell, Powys, and Gould.

[8] Morris *v.* Sir Richard Reynolds, 2 Ld. Raym. 857.

report of the case says, great misconduct appeared; but another[9] says the award was examined and confirmed; that the plaintiff moved for an attachment for nonperformance; but that the court held that the nonperformance, while the matter was under examination, was no contempt.

When the submission is by reference at *nisi prius*, there is no time limited for making an application to set aside an award for any cause, whether for corruption or for an objection appearing on the face of the award; and the defendant has the same advantage in shewing cause against an attachment being granted on the application of the plaintiff.[1]

When the submission is by consent to have it made a rule of court according to the statute, no application can be made to have the award set aside till the submission be actually made a rule of court;[2] but it is not necessary, as suggested in one book,[3] that the submission be made a rule of court before the award made; that may frequently be impossible, because the award may be made in the vacation, before any term arrives after the submission.[4]

By the words of the statute, however, the complaint must be made before the end of the next term after making the award; and it is said[5] that nothing is a ground within that statute for setting aside an award but the misconduct of the arbitrators: and accordingly

[9] S. C. 1 Salk. 73.

[1] Vid. 2 Atk. 155, (162.) and a Dictum of Lord Macclesfield. 1 Barnard. 461. Str. 301. 2 Bur. 701.

[2] 1 Str. 301. 2 Ves. 317. 2 Str. 1178.

[3] 3 P. W. 362.

[4] Vid. 1 Barnard. 153.

[5] 1 Str. 301.

the court will not grant a motion to set aside an award for an objection appearing on the face of it; though that will be a good reason for refusing an attachment to enforce it.[6] But as that statute was made to put awards made according to the directions of it, on the same footing with awards made in consequence of references at *nisi prius*, and is declaratory of what the law was with respect to them, any other objection may be made to an award founded on a submission of the former kind, which might be made to one founded on a submission of the latter;[7] and where the objection arises on the face of the award, it may be made at any time, on shewing cause against an attachment, though it be after the time allowed by the statute for complaining against corruption.[8]

Where the submission was by consent under an order of a court of equity in a cause depending there, it was formerly held that exceptions might be made to the award, as to a master's report. And when the party complaining of the award alleged that the arbitrators had not considered certain particulars, which were in issue in the cause, it was also held the court would order the arbitrators to certify whether they had considered them, and would examine into the merits of the award; and if it were found unjust, performance would not be decreed, even though it were expressed in the order of reference, that the award to be made

[6] Vid. Hutchins v. Hutchins, Andr. 297. Pedley v. Goddard, 7 Term Rep. 73. [1 East, 276. Lowndes v. Lowndes.]

[7] Vid. 2 Bur. 701.

[8] Barnes, 57. Id. 55 contra. Vid. Pedley v. Goddard, 7 Term Rep. 73 acc.

should be final, and confirmed by a decree of the court without exception or appeal.[9]

But this doctrine, so far as it relates to *exceptions* being taken to an award, has been since in a great measure overruled.—In one case[1] Lord Thurlow is reported to have said in general terms, that where a matter in a cause had gone to a reference, a party could not *except* to the award, but that the question of its validity must come on upon further directions.

In a subsequent case, exceptions having been taken to an award, a motion was made to discharge the order for filing them, on the ground that the award being made by persons appointed Judges by the parties themselves, was final and conclusive.—The Lord Chancellor[2] said 'if it remained open to exceptions it seemed to be rather a reference than an award; that it was intended in the present case that the whole matter should be referred to the arbitrators in exclusion of the court, except as to the costs; that the proper motion would be "to set aside the award," and the topics in the exceptions might be discussed on such a motion:' and he expressed his disapprobation of the cases, in which the former doctrine had been maintained.[3]

In another case the present Chancellor[4] declared that if parties litigating consented to substitute arbitrators instead of a master, they might: but if they agreed

[9] 1 Ch. Ca. 186. 1 Vern. 469, 470. 2 Vern. 109.

[1] Woodbridge v. Hilton, 1 Brown. Ch. Rep. 389.

[2] Thurlow.

[3] Rice v. Williams, 3 Brown. Ch. Rep. 163. The same case, but in a subsequent stage seems to be reported in 1 Vez. junr. 365. under the name of Price v. Williams.

[4] Lord Loughborough, in Morgan v. Mather, 2 Vez. junr. 22.

to refer the *whole* matter to judges of their own choice, HE could not correct the error of THEIR judgment on the facts.

In two cross suits depending in Chancery between Dick and Miligan, and Miligan and Dick, an order was made by consent, by which it was referred to the Master to take the accounts. A reference to arbitrators afterwards took place; and by the order of reference the arbitrators were to take an account of all dealings and transactions, in like manner, as if the same had been referred to the Master; and it was ordered that the parties should be bound and concluded by the award, and should observe the same; and further directions were reserved:—when the award was made, Dick was very much dissatisfied with it, though no corruption or misconduct was imputed to the arbitrators; after a great deal of discussion, however, he obtained leave to file exceptions to it; and the right to file them was supported on these grounds: that the present reference differed from a general reference of all matters between the parties; that the arbitrators in this case were only to make an inquiry in the character of the Master, in order to pave the way for the decision of the court; that by the terms of the order of reference, they were to take the accounts in the same manner as the Master, and that therefore they were under the control of the court.—A distinction was admitted between a reference to an arbitrator to find only a particular fact, and a general reference of all matters where the award was to be final: but here the court[s] were all clearly of opinion, that though it was

[s] Lords Commissioners Eyre, Ashhurst, and Wilson.

expressed that the accounts should be taken as before a Master, yet this was controlled by the latter words of the order, which provided that the parties should be concluded and bound by the award. It was also admitted by the court, that where there was any thing on the face of the award, which, being compared with the proceedings in the cause, it appeared ought not to be there, or something omitted which ought to be in it, that was proper matter of exception; but that exceptions ought to be confined to matter appearing on the face of the award, compared to matter appearing in the pleadings and the orders in the cause. With regard to matters of fact, however, there was an essential difference between a reference to a Master and a reference to an arbitrator; the latter was constituted judge of the facts without appeal, the former was only a minister to prepare something for the court, which was really the judge: In the other case the arbitrator was the judge and not the court, which, by the reference, had divested itself of all judgment. This was the case of all arbitrations in courts of law; and there was no distinction as to that point between arbitrations in courts of law and in courts of equity. Why ought such distinction to be made? because, it was said, a court of equity has something to do upon further directions. This was an appearance of argument, that it was proper an award in a court of equity should be more particular than in a court of law; but when the reference was general, and the award was to be final, the court had nothing further to dispose of but the costs.[6]

[6] Dick v. Milligan, et e conv. 2 Vez. jun. 23.
4 Brown. Chan. Rep. 117, 536.

*For what causes an Award may be set aside.*

The most frequent subject of complaint against an award arises from some imputed misconduct of the arbitrators; but neither this nor any thing else extrinsic of the award itself can be shewn for cause against an attachment; it must be made the subject of a specific motion to set the award aside.[7] If the submission be to three, or any two of them, and two, by any undue means, exclude the third, that alone is sufficient to cause the award to be set aside.[8]

So, if the arbitrators hold private meetings with one of the parties, and admit him to be heard, to induce an alteration in their award, this is such gross partiality as to induce a court of equity to set it aside.[9]

Where an umpire was chosen by the arbitrators by throwing cross and pyle, this was thought sufficient reason to set aside the umpirage.[1]

So, where the servant of the person chosen umpire had, before the award made, given out that he was sure his master would award 150*l.* and it appeared that the arbitrators had differed, the one consenting to give 35*l.* and the other insisting on 95*l.* and that the umpire coming in had given 150*l.*—these circumstances the court considered as an evidence of fraud and corruption, and therefore decreed the arbitration bond to be given up.[2]

So, where the arbitrators promised to hear witnesses, but afterwards made their award without hearing any.[3]

[7] Vid. Anon. Andr. 299. Holland v. Brooks, 6 Term Rep. 161.

[8] 2 Vern. 515.

[9] Id. ibid. [Vid. Atkinson v. Abraham, 1 Bos. and Pull. 175.]

[1] Id. 485.

[2] Id. 101.

[3] Id. 251. [Award set aside, because the arbitrator received evidence after notice to the parties that he would receive no more, in which they acquiesced. 6 Vez. jun. 70. Walker v. Frobisher.]

So, where they promised not to make their award till one of the parties who was not well, should come abroad, but they made it before.[4] (*q*)

There were several stated accounts between the plaintiff and the defendant, by which considerable sums were due from the defendant, to the plaintiff, but the arbitrator, without regarding any of these stated accounts, made up an account in his own way, bringing in the plaintiff indebted to the defendant 25*l.* and intended to award the former to assign over to the latter a mortgage which he had on the other's estate, on which mutual releases were to be given. The plaintiff understanding what award the arbitrator was about to make, sent a messenger about two or three days before the time for making the award was expired, to inform him that the plaintiff desired him to defer making his award until he should talk with him about his demands to support the stated accounts, and know what objections were made against them. The arbitrator, however, would not defer making his award. The Lord Chancellor, on a bill filed by the plaintiff to have the award set aside, said that it was acting unduly to proceed in making the award, when the plaintiff had desired to be heard against the arbitrators determining in contradiction to so many stated accounts. And though it was answered that the application from the plaintiff was within two or three days before the time for making the award was expired, and with an intent that no award should be made; and though it did not appear that the plaintiff was ready to

[4] Id. Ibid.

(*q*) So where upon entering into the case, the parties began a warm altercation, for which reason the referees directed them to withdraw, and called the witnesses one after another, examining them separately out of the hearing of both plaintiff and defendant, and then reported in favour of the former. *Hagner* v. *Musgrove*, 1 Dall. 83.

So

be heard within the time, yet as there seemed to be just ground for the plaintiff to desire to be heard, and it was difficult to assign a reason for rejecting so many stated accounts so recently allowed and passed between both the submitting parties, the court set aside the award with costs.[5] In the case of Ward, before mentioned, Walker, one of the arbitrators, had said he would make Ward pay costs; Lord Macclesfield thought this such a declaration, that though Floyd, the other arbitrator, joined in the award, he decreed satisfaction to be acknowledged on the judgment on the bond of submission, and inverted Walker's threats by making *him* pay costs.[6]

Lord Hardwicke approved of this decree, and on the authority of it made a similar one in the case of Chicot and Lequesne. There were three arbitrators, G., Vine, and Myhill: the award was made without the latter hearing it, or having an opportunity of conference to convince the others, or be convinced. It appeared in evidence, that at one of their meetings Vine saying he should consider and judge on plain facts, G. replied, he should not mind facts, that being convinced Mr. Letellier had misused the Lequesnes, and having it now in his power he would mulct his representatives. Lord Hardwicke declared, that if these were words of warmth only, they were a declaration made by a person who was to act the part of a judge; and if he carried that heat and passion into execution, the award ought not to be suffered to stand. If it was the result of his judgment on the merits, it

[5] 3 P. W. 362. Spettigue v. Carpenter.

[6] 2 Ves. 317.

So where the referees allowed *ex parte* evidence to be given of the current price of coachmakers' work at the time the cause of action accrued. *Chaplin* v. *Kirwan*, 1 Dall. 187.

So where an *ex parte* affidavit was produced before the referees and umpire, respecting the sea worthiness of a ship, which affidavit the defendant had

was a partial result; his Lordship therefore ordered that G. and M. should be examined on interrogatories before the master, Vine having been examined before; and if it should come out that G. did make that declaration, he would follow the precedent, and make him pay costs.[7]

Arbitrators had insisted on three guineas a piece to be paid them by each of the parties, before making their award, for their trouble and expences. The defendant refused to do it on his part, and the plaintiff paid the whole money. The court thought this a matter of so delicate a nature, and the example so dangerous, that they set aside the award on that account, because if it should be suffered, it would be hard to distinguish what was corruption.[8]

It has been thought that the circumstance of the arbitrator's employing the attorney, of the party in whose favour the award was made, to draw it up, was a proof of corruption: but there is no case to that purpose, nor does it at all appear a sufficient reason for setting aside an award: the arbitrator employs the party's attorney as his own: and if this objection were good, it is apprehended a great many awards might be set aside which are perfectly fair.[9]

If the arbitrators appear to have an interest in the subject of the reference, a court of equity will consider this as a sufficient ground for setting aside the award.—Therefore, where it appeared that the award related to a cargo, in which the arbitrators were interested, and that five days after the award made they attached the

[7] 2 Ves. 216—218.

[8] B. R. H. 54. 2 Barnard. 463.

[9] Vid. 1 Barnard. 430. [9 Vez. jun. 67. Fetherstone v. Cooper.]

had no opportunity of reading or examining. 4 Dall. 272. *Passmore* v. *Petit & Bayard.*

So where the referees refused the defendant the necessary time to produce testimony from Halifax, touching the matter in dispute. Id. 4 Dall. 272.

money awarded for debts owing to them by the party in whose favour they had awarded, the court set aside the award, presuming that the arbitrators might have set too great a value on the cargo, from the interest they had in the subject.[1]

It is reported to have been said by Lord Hardwicke, that arbitrators are not bound to give notice to the parties of the time when, and of the particular place where, they intend to meet:[2] it is not easy, however, to see the reason or justice of this observation.

In the same case his Lordship is reported to have said, "that the *only* ground to impeach an award is "collusion, or gross misbehaviour in the arbitrators:" This proposition is certainly not correct.[3] Without collusion or gross misbehaviour, a material mistake in point of fact, an erroneous statement of an account, even a plain mistake in point of law, coupled with other circumstances, are grounds for an examination in a court of equity, from the result of which the award may be partially affected in a greater or a less degree, and sometimes totally set aside.[4]

Thus, though a court of equity, where the only object of the bill is to set aside an award, will not permit the plaintiff to discuss legal objections to it, but will confine him to those for partiality and corruption; yet if the bill, beside praying to set aside the award,

[1] 2 Vern. 251.

[2] Tittenson v. Peat, 3 Atk. 497, (530).

[3] Vid. S. S. Company v. Bumstead, Vin. Arb. 140. pl. 39.

[4] Cornforth v. Green, 2 Vern. 750. cited in Ridout. v. Paln, 3 Atk. 462, (494). [An award will not be set aside because the arbitrator made use of the judgment of another person; that judgment is his if he chooses to adopt it. 5 Vezey, jun. 846. Emery v. Wase.]

pray also for an account, he will be permitted to make legal objections in order to let in such an account.[5]

If indeed the arbitrators appear to be mistaken in a *doubtful* point of law, the award may be permitted to stand, though the court, after great deliberation, should be of a different opinion.[6]

And in a late case, where no lawyer could doubt upon the point of law, this distinction was laid down by the Court of King's Bench: That where the arbitrators, meaning to follow the law in their determination, happen to mistake it, this is a good reason for setting aside their award, so far as it is affected by that mistake: but, where knowing what the law is, or laying it intirely out of their consideration, they make what they conceive, under all the circumstances of the case, to be an equitable decision, it is no objection to the award that in some particular point it is manifestly against law.

A man, having five grand-children by a deceased daughter, and a daughter living who had two children, by his will gave to his eldest grandson, by his deceased daughter, a legacy of two thousand pounds, to one of his grand-daughters, by his deceased daughter two thousand pounds, to each of the other three children of his deceased daughter, and to each of the two children of his living daughter, one thousand pounds, and to his living daughter a pecuniary legacy, about which it was disputed whether it was intended by the testator

[5] Vid. Champion v. Wenham, Ambler 245.

[6] Dict. pr Ld. Hardwicke, 3 Ath. 462, (495.) [If a question of law is referred to an arbitrator he must decide upon it, and though he decides wrong, you cannot help it. 6 Vez. jun. 282, Ching v. Ching, sed vid. Kent v. Elstob, 3 East, 18.]

to be one, two, or three thousand pounds: to his daughter, and to several of his grand-children, he gave several real estates, in words which conveyed only an estate for life to each of the respective devisees. There were other bequests, about which there was no dispute; and of the residue of his personal property, consisting of various particulars, and amounting in the whole to about twelve thousand pounds, he made no disposition. He made his two sons-in-law executors. His eldest grandson by his deceased daughter claimed the half of the book debts, and a considerable sum besides, as partner in his trade. The executors resisted this claim; in consequence of which a general submission was made to the award of three gentlemen, who were supposed to have been well acquainted with the intentions of the deceased. The parties to the submission were the executors of the first part; the eldest grandson by the deceased daughter of the second part; and the same grandson, the husband of the living daughter, and the rest of the grand-children, and the husbands of such of them as were females and married, of the third part.—The arbitrators, by their award, among other things, for which the award was not impeached, directed that the several devisees of the real estate should hold the several parts respectively devised to them, in fee-simple; that the executors should pay to the eldest son of the deceased daughter a considerable sum, as the balance due to him as partner with the testator; that they should also pay him another sum, being the moiety of the book debts due to the partnership; and that the remainder of the book debts, together with all the residue of the personal property, should be equally divided among the seven grand-children of the

testator.[7] The submission to this award was made a rule of the Court of King's Bench, under the statute.—On the part of the husband of the deceased daughter an application was made to the court to set aside this award, on these objections:—first, that the arbitrators had declared the eldest grandson by the deceased daughter of the testator to have been a partner in his trade, whereas, in fact, he never had been such partner, and the question of partnership had never been discussed by the arbitrators in the presence of the applicant; and, secondly, that the arbitrators had, in two particulars, taken upon themselves to *make* a will for the testator, instead of *explaining* what he had made; first, that they had given to the several devisees of the real estates, estates in fee-simple, whereas the testator had given them only estates for life; the consequence of which was that the reversion in fee belonged to the living daughter and to the eldest son of the deceased daughter in coparcenery; and, secondly, that they had directed the residue of the personal property to be divided equally among the *seven* grand-children of the deceased; whereas, by the statute of distributions, it belonged, in equal moieties, to the *living* daughter, and to the *five* grand-children by the *deceased* daughter.

The first objection was fully answered by the affidavits of the arbitrators, and of the eldest grandson of the testator by his deceased daughter; and by the same affidavits it appeared, that with respect to the real estates the award had only confirmed some agreements which had been made among the parties themselves.

[7] Vid. this award in the Appendix.

With respect to the objection to the manner in which the arbitrators had disposed of the residue of the personal property, the court suggesting the distinction above-stated, directed that the arbitrators should make an additional affidavit, and state whether they had intended to follow the statute of distributions, or had laid it intirely out of their consideration, and decided on equitable circumstances.

The arbitrators made such additional affidavit, in which they stated, "that in disposing of the residue "among the seven grand-children they did not con- "ceive they were making any distribution of it ac- "cording to any fixed rules of law upon the subject, "but that they were dealing out to the several parties "interested what appeared to them to be, according to "the best of their judgment, under all the circum- "stances of the case, strict and impartial justice, agree- "ably to what they believed to have been the intention "of the testator."

The court thought this a sufficient answer to the objection, and discharged the rule.[8]

Where any circumstance is suppressed by either of the parties, or concealed from one of the arbitrators, and if the arbitrator declare that had he known that circumstance he would not have made such an award, that will be a sufficient reason for setting aside the

[8] Ainsley v. Goff, Hilary Term, 1799.—In this case the court acted as a court of equity. It might have been taken as a preliminary objection to the application that the court could not under the statute enter into *legal* objections to the award in this stage; but that objection was not started.—Vid. ante p. 341, 342. [3 East, 18. Kent v. Elstob & al.]

award. Thus where certain marriage articles were shewn only to one of the arbitrators, and the other after the award made declared that, had he seen the articles, he would not have consented to the award—Lord Hardwicke set the award aside.[9]

On a submission at *nisi prius* of all matters in difference between the parties, the arbitrator, on settling all articles of account, found one of them indebted to the other in a sum of 50*l.* but that the party so indebted was security for the other in a bond; he therefore awarded that the party indebted should pay the 50*l.* but not until the other had either discharged the bond or indemnified the security against it. At the time of the reference the party indebted was in Ireland, and the matter was conducted on his behalf by his attorney, who was not acquainted with any other circumstance than those laid before the arbitrator; the party to whom the money was awarded indemnified the other against the bond or discharged it, and then brought an action for 50*l.* holding the other to bail: it was then discovered that the defendant was bound as a security for the plaintiff, in another bond to a considerable amount; a circumstance which was within the plaintiff's knowledge at the time of the reference, but which he had concealed. The arbitrator now swore that had this circumstance of the other bond been laid before him, he would not have awarded the 50*l.* without providing that the plaintiff should either discharge the second bond, or indemnify the defendant against it. On these circumstances being stated to the court, they

[9] 1 Atk. 77, (84.)

granted a rule to shew cause: but the event I have not heard.[1]

In the two cases immediately preceding, it was alleged, that the arbitrator had declared, "that had he been acquainted with the facts concealed he would have made a different award." The two following cases, however, shew that such an allegation is not necessary, and that it is sufficient "that, from the nature of the facts concealed, it may be reasonably supposed his award would have been different."

In the time of Lord Talbot a bill was filed in Chancery for an account against the defendant, as Supercargo of the South Sea Company. At the hearing all matters were referred, an award was made, and mutual releases executed. The plaintiffs exhibited a new bill, suggesting, that since the award they had received information of effects to the value of 119,000 dollars, concealed by the defendant from the arbitrators. The defendant pleaded the award and releases, and answered that the account taken by the arbitrators was fair and just, but did not answer to the concealment particularly mentioned in the bill. Lord Talbot, after remarking that by the express words of the statute awards were to be set aside only for partiality or corruption in the arbitrators, declared that this rule was too confined to be applied to a bill filed in a court of equity, and that there were other reasons equally cogent—such were fraud and concealment in either of the parties. It was true, he said, that arbitrators were in the nature of judges, and in some respects had a

[1] M. 1790. B. R.

greater latitude, not being confined within the rules of a court of law or equity, and therefore might make such allowances as could not be admitted in the courts of judicature: but, as at law, where a judgment is obtained by fraud or surprize, nothing was more common than to set the judgment aside; and, as upon decrees, bills of review were daily brought in this court, where evidence had arisen, which could not be obtained at the time of the decree; so there was the same reason in the case of awards. In the present case it could not be imagined that the defendant had accounted for the matters in question, and that this must have occasioned a considerable difference in the award. For these reasons the plea was overruled, and the defendant ordered to answer.[2]

An annuity had been granted, payable out of certain estates, of which part came afterwards to the plaintiff and part to the defendant. Disputes having arisen respecting the proportions in which this annuity was to be paid, a bill was filed in the Court of Exchequer, praying a decree for the apportionment of the payments; the parties submitted to have the question referred, by order of the court, to arbitration; the appointment was of *course* to be regulated by the respective values of the parts of the estate in the hands of the parties. An award was made: a bill was afterwards filed by the plaintiff, charging that the defendant, in the account he had laid before the arbitrators of the particulars of the estate in his hands, had suppressed several parcels, and wilfully misrepresented its

[2] South Sea Company v. Bumpstead, 2 Eq. Ca. Abr. 80.

extent and value. The bill further charged that the plaintiff had not till lately discovered the fraud, and prayed to have the matter opened. One member of the court,[3] observing that the plaintiff alleged a material part of the circumstances of the case to have been unknown to him till after the award, said it might well be questioned whether this alone would have been sufficient to let in further inquiry; but they all agreed that the subsequent charge of wilful concealment by the defendant ought to preclude him from having any benefit from the award; that the suggestion was, that, according to the principle of decision actually adopted by the arbitrator, he must have drawn a different conclusion if he had not been deceived, and therefore they thought that the fact of the concealment should have been investigated.[4]

One case is reported where a court of equity set aside an award, principally on the ground of excessive damages. The plaintiff in the bill had called the defendant, who was a butcher, a bankrupt knave; the matter was submitted to arbitration, and the arbitrators gave the butcher 495*l.* to repair his honour. The Court of Chancery thought this excessive, and set aside the award, and directed a trial at law, and the jury gave him 10*l.*[5] One of the books,[6] however, in which this case is mentioned, says that the court did not set aside the award merely for excessive damages, but because it appeared that one of the referees was the

[3] Mr. Baron Thompson.

[4] Gartside v. Gartside, 3 Anstr. Rep. Exch. 735.

[5] Butcher of Croydon's case, 3 Chan. Rep. 76. 2 Vern. 251. 1 Eq. Ca. Abr. 49, (50.)

[6] Vern. 254.

butcher's cousin: yet it must be observed, that the excess of damages must have been the principal reason, because it is certain the relationship of the arbitrator to the party is not a reason for impeaching an award.

By the Roman law, the party who thought he had reason to complain of an award might be relieved against it for reasons of the same nature with those which are the foundations of relief in our courts.[7]

Where the submission is under the statute or by reference at *nisi prius*, the court will listen to an application to have the award sent back to the arbitrator to reconsider it, on the suggestion that he had not sufficient materials before him; and perhaps too, to rectify any trifling or apparent mistake: but when the submission is according to the statute, such application must be made, within the time thereby prescribed, though no misconduct be imputed to the arbitrator.[8]

If an award appear on the face of it to be contrary to the rules of a court of equity, that will be a reason for

[7] Ita demum autem committetur stipulatio, cum adversus eam quid fit, si sine dolo malo stipulantis factum est: sub hac enim conditione committitur stipulatio, ne quis doli sui præmium ferat. Sed siquidem compromisso adjiciatur, *siquid dolo in ea re factum sit:* ex stipulatu conveniri, qui dolo fecit, potest. Et ideo, si arbitrum quis corrupit vel pecunia, vel ambitione, vel advocatum diversæ partis, vel aliquem ex his quibus causam suam commiserat; vel si adversarium callide circumvenit. Et omnino si in hac lite dolose versatus est: locum habebit ex stipulatu actio. Et ideo, si velit de dolo actionem exercere adversarius: non debebit cum habeat ex stipulatu actionem. Quod si hujusmodi clausula in compromisso adscripta non est, tunc de dolo actio, vel exceptio locum habebit. Hoc autem compromissum plenum est, quod et doli clausulæ habet mentionem.—Ff. l. 4. t. 8. s. 31.

[8] 2 Term Rep. 781.

such a court to set it aside; as if it concern an infant, to whom a sum of money is awarded; and it is also awarded that the guardian shall give a bond that the infant shall, at his full age, convey certain land in dispute: for this, it has been said, is inequitable, because the infant may die, or if he live to full age, may refuse to convey.[9]

*How far an Award may be pleaded to a bill filed to set it aside.*

In our books mention is frequently made with approbation of a maxim adopted from the civil law, "that, that against "which relief is prayed cannot be plead-"ed in bar of such relief."[1] Yet there are two cases to which this maxim seems peculiarly applicable, but in which it has seldom prevailed; I mean the case of an award, and the case of a release.

The learned author of "a treatise of the pleadings by English Bill," following the authority of decided cases,[2] has without any comment expressive of disapprobation, laid down, 1st, "That an award may be "pleaded to a bill to set aside the award, and open the "account; and that it is not only good to the merits "of the case, but likewise to the discovery sought by "the bill. But that if fraud or partiality be charged "against the arbitrators, those charges must not only "be denied by way of averment in the plea, but the "plea must be supported by an answer shewing the "arbitrators to have been incorrupt and impartial."— 2dly, "That if the plaintiff has released the subject of

[9] 1 Ca. Ch. 279, 280.

[1] Non competit exceptio ejusdem rei, cujus petitur dissolutio.

[2] 2 Atk. 395; 501.

" his demand, the defendant may plead the release in " bar of the bill which prayed that the release might " be set aside, notwithstanding the objection that a plea " of the release is in such a case *exceptio ejusdem rei* " *cujus petitur dissolutio.*"[3]

Having, without success, taken a great deal of pains to reconcile this doctrine to my own notions of propriety and consistency in pleading, I will detail the most remarkable of the cases I have been able to find on the subject, and submit a few remarks to the consideration of the reader.

A. and B. partners in a concern of buying and selling diamonds in France in the year 1719, having some disputes, submitted them to arbitration; the arbitrators made their award, with which A. not being satisfied, filed a bill in chancery against B. and the arbitrators for an account, and to have the award set aside: B. as to the account pleaded the award; and the arbitrators, as to a discovery of several particulars prayed by the bill, and as to any relief against *them*, pleaded the submission, and that by consent, it was made an order of this court.—The Lord Chancellor allowed B.'s plea as to the account, but overruled the plea of the arbitrators as covering too much, that is to say, several particulars, which might tend to shew a partiality in their proceedings.[4]

Had the bill taken no notice of the award, but prayed merely for an account, I can see the good sense

[3] Mitford 209. 3 Vin. Arb. 139. pl. 38. cited 2 Eq. Ca. Abr. 92. pl. 4.

[4] Godfrey v. Boucher, 4 G. 2.

of allowing the former to be pleaded in bar of the latter, provided the former cannot be impeached on any of the grounds on which an award may be impeached: but here the bill states the award, with reasons of complaint against it, and prays that it may be set aside as a preliminary step towards taking the account.—I cannot understand how the award itself, the very object of complaint, should be set up as an obstacle to relief against that complaint.

In 1730 a bill was filed by the South Sea Company against Bumstead, one of their supercargoes: at the hearing all matters were referred; an award was made, and mutual releases were executed.—The Company brought a new bill, suggesting that since the award, they had received information of effects to the value of 119,000 dollars, concealed by the defendant from the arbitrators. The defendant pleaded the award and releases, and answered that the account taken by the arbitrators was fair and just, but did not answer to the concealment particularly mentioned in the bill.—Lord Chancellor Talbot said, "It is a rule, and so are the "express words of the statute, that awards made "between parties shall not be set aside but for cor- "ruption or partiality in the arbitrators; but there are "other reasons equally mischievous and proper for "relief in this court; as where there is fraud or con- "cealment in either of the parties. It is true, arbi- "trators are in the nature of judges, and in some "respects have a greater latitude, not being confined "within the rules of law or equity, and therefore may "make such allowances as could not be admitted in "courts of judicature: but as at law, where judgments "are obtained by fraud or surprize, nothing is more

"common than to set the judgment aside; so upon "decrees, bills of review are daily brought in this "court, where evidence arises which could not be "obtained at the time of the decree: there is the same "reason in the case of awards; and in this case, it "cannot be imagined that the defendant had accounted "for these matters, supposing the fact to be true, for "this would have occasioned a considerable difference "in the award:" for *this* reason the plea was overruled, and the defendant ordered to answer.[5]

The plea, therefore, was overruled; not because it was considered as improper in itself, but because it was not supported by an answer to the charge of concealment. Had that charge been answered, the plea would have been sustained: but it may be remarked that had the charge been answered, the plea would have been unnecessary.

Sir Edward Desbouvrie, a freeman of London, possessed of a very great personal estate, had a wife, a son, and a daughter. He compounded with his wife as to her customary share, and made his will, by which he gave to his daughter 10,000*l.* upon condition that she should release her orphanage part, together with all her claim or right to his personal estate by virtue of the custom of the city of London, or otherwise, and made his son executor, his daughter being about twenty-three years of age.

After the death of the testator, the daughter agreed with her brother to accept the legacy on the terms

[5] South Sea Company v. Bumstead, 15 March, 1734. 2 Eq. Ca. Abr. 80. pl. 8. 3 Vin. Arb. 140. p. 39. not so distinctly reported in the latter book as in the former. Vid. this case ante, p. 356.

on which it was given her by her father's will: a release was accordingly prepared, and before she executed it, her brother informed her, that she had it in her election, to have an account of her father's personal estate, and to claim her orphanage part.—She declared she would accept of the legacy, that being a sufficient provision for any young woman; she executed the release, and her brother paid to her the 10,000*l.* with interest.—She afterwards married an attorney, who filed a bill to have this release set aside, charging that the personal estate of which the father died possessed, was much above 100,000*l.* the daughter's share of which by the custom would, under all the circumstances of the case, amount to upwards of 40,000*l.*

The brother, the defendant, pleaded this release.

On behalf of the plaintiff it was argued, that as the bill was filed for the purpose of having this release set aside, the defendant ought not to be admitted to plead it in bar, the rule being "non potest adduci exceptio "ejusdem rei cujus petitur dissolutio." But the Lord Chancellor interrupted the counsel, saying, this was every day's practice; and that otherwise "no release "or award could be pleaded to a bill that was brought "to set aside the same."[6]—The maxim being adopted, the consequence is inevitable, "that no release or award can be pleaded to a bill brought to set them aside:" and I think it is against good sense to permit them to be so pleaded.

[6] Pusey v. Sir Edward Desbouvrie, 3 P. Wms. 315, 316.

Lingood and Eade had been partners in trade; upon the dissolution of the partnership, some disputes arising, a suit in chancery was for some time carried on between them; in the course of which a proposal was made and accepted, of referring all matters in controversy, and the submission was made an order of that court: one condition was that the (parties) should be restrained from bringing a bill in equity against the arbitrators: they awarded that 9150*l.* were due to Eade on the balance of accounts: Lingood brought a bill against the arbitrators and Eade, charging corruption and partiality, and praying that they might set forth the general accounts between the plaintiff and the defendant Eade relating to the partnership.—To so much and such part of the bill as sought a general account the defendants refused to make discovery, and pleaded the award in bar.

The bill further prayed a discovery on what account or accounts of the parties the arbitrators founded their award.

To this part also, they refused to discover, and pleaded the award itself in bar.

Lord Hardwicke is reported to have said: "There "are many instances in this court, where arbitrators, "to a bill charging corruption and partiality, may "plead the award in bar to the discovery; but then it "is incumbent upon them to support their plea, by "shewing themselves incorrupt and impartial, or other-"wise the court will give a party a remedy, by making "arbitrators pay costs."

"The great doubt with me is, as this award seems "executory and not final, whether it is a good award

" at law, then how can the arbitrators plead it in bar to " the discovery, prayed by the bill?"[7]

Here it may be remarked, that an award can only be impeached either from objections appearing on the face of it, or from extrinsic circumstances, such as improper conduct in the arbitrators, or concealment in one of the parties: if the plaintiff seek to set aside the award from any alleged intrinsic defect, he will, of necessity, expose such defect by his bill: if in doing this he set out the *whole* award fairly, it seems altogether irreconcileable to common sense, that the defendant should be permitted to answer the complaint against the award, by pleading the award itself with all its alleged defects.—In such a case, if the defendant think he can support the award on its intrinsic merits, the proper mode of doing this seems to be, to demur to the bill.—If the plaintiff set out the award partially, stating only such parts as he supposes, taken by themselves, would render the award void, this may sometimes be answered by the defendant, by stating such other parts as, coupled with the apparently faulty parts stated in the bill, would render the whole valid: but I apprehend this might as well be done by answer as by plea.[8]

When the ground of impeaching the award arises from extrinsic circumstances stated in the bill, the above dictum admits that the mere statement of the

[7] Lingood v. Croucher, 2 Atk. 395, (411.)

[8] This reasoning proceeds on the assumption that a bill will lie to set aside an award merely from objections appearing on the face of it, which however, it has been seen, is not the case.—Vid. ante, p. 327. [It seems to be otherwise if the objections be of an *equitable* kind. Vid. ante, p. 360. n. 9.]

award by way of plea is not sufficient without a denial of those extrinsic circumstances in support of it. As the complaint against the award arises from those extrinsic circumstances only, I apprehend the mere denial of them, *without* a plea, would be a sufficient answer to the bill.

Lingood had preferred his petition to set aside the award in the matter between him and Eade;[9] this petition was dismissed, but without prejudice to his bringing a bill for the same purpose: he brought a bill accordingly against the arbitrators and Eade, by which he prayed that he might have inspection of all the accounts, from which the arbitrators framed their award; that the award might be set aside, and that the defendant Eade might account generally for all transactions during his partnership with the plaintiff.

Eade pleaded, that in former causes between him and the plaintiff in this court, an order was made the 18th of November 1740, at the request and by the consent of the parties, that all matters in difference between them relating to their joint dealings, or otherwise, should be referred to certain persons whom he named in his plea, the award to be made on the first day of May then next; that by a subsequent order of court, with the consent of the plaintiff's counsel, the time for making the award was enlarged till the first of November, and by a third order till the first of February; that the arbitrators met 45 times, the plaintiff

[9] The reference must, therefore, have been made under an order of the court, in the course of a cause depending, otherwise the court could not have entertained this petition.

and defendant being present at the greatest number of the meetings, and having fully heard and examined the plaintiff and the defendant, and their several witnesses, made their award within the time limited: and among other things declared that they had taken an account of the outstanding debts due to or owing by or from the complainant and the defendant, or either of them, on account of their joint dealings, and they awarded that each should pay and discharge one equal moiety of the several debts therein mentioned; that is to say, to Samuel Torin 92*l.* 10*s.* 9*d.* to Slingsby Bethel 82*l.* 18*s.* 2*d.* and to John Hide 15*l.* which the said arbitrators found to be then remaining due from the complainant or defendant, or one of them, on their joint accounts, be the same more or less than as above mentioned.

That the arbitrators have set forth in a schedule to their award, an account of sundry debts and effects owing to the partnership, amounting to 5094*l.* 14*s.* 2*d.* which debts and securities they awarded to belong in moieties to the plaintiff and the defendant; and for the better getting in the same, the arbitrators recommended to the defendant and complainant to consent that an order might be made by this court for the appointment of a proper person, conversant in mercantile affairs, to collect in the same for their joint use; and in case either of the parties should refuse to consent thereto, the arbitrators did make it their humble request to this court to order the same, as the most probable means of preventing future litigation between the parties.

That the arbitrators did award and declare, that exclusively of the above matters there was then due

from the plaintiff to the defendant the sum of 9194*l.* 19*s.* 6*d.* on a just balance, which they awarded to be paid by the plaintiff to the defendant by instalments of 2000*l.* on each payment, with interest at 4*l.* per cent. from the second of the same February.

That lastly they did award, that upon payment of the said sum of 9194*l.* 19*s.* 6*d.* the plaintiff and defendant should mutually execute and deliver to each other respectively a good and sufficient release and discharge, (the form to be settled by one of the masters of this court, in case this court should be pleased to give directions for the settling thereof), whereby the said parties should respectively release to each other all matters in difference between them relating to their joint dealings, &c.

"The defendant for plea further saith, that all the "said particulars so awarded are fair and just; all "which matters and things he pleads in bar to the "plaintiff's bill, and submits to the court, whether he "is obliged to make any other or further answer."

The validity of this plea being argued before Lord Hardwicke, on the validity of the award, his Lordship expressed himself thus: "Though the bill is brought "for two purposes, yet one is consequential to the "other. First to set aside the award. Secondly for a "general account.

"The prayer of the bill to set aside the award must "be founded upon the fraud, corruption, or misbeha-"viour of the arbitrators; for it would be improper to "come into this court to set it aside merely for an ob-"jection in point of form. The other part of the bill is "the original right the party had before the award."

"I must consider the plea, as it is pleaded to the lat-
"ter part of the bill, the general account. For to be
"sure, the plaintiff is intitled to an account, unless the
"award is a bar; and therefore the court must enter
"into all the legal objections against the award, which
"a court of law would have done, as it is insisted on
"by the plea to prevent the general account."

That the bill was brought for two purposes; to set aside the award, and for a general account; and that the latter was consequential to the former: that the prayer of the bill to set aside the award must be founded on the fraud, &c. of the arbitrators; that it would be improper to go into a court of equity to set aside an award merely for an objection in point of form; and that the other part of the bill is the original right the plaintiff had before the award: all this I understand.—

Had the bill been brought to have an account on the mere statement of the original transactions without taking any notice of the award, and had the defendant pleaded the award in bar of that account, then I could have understood that the whole question before the court was the legal validity of the award: and the award being pleaded to a bill seeking to set *aside* the award, and to have an account, I can also understand, that unless that award be proof against all legal objections, it shall *not* be admitted as a plea in *bar* of the account: but admitting the award thus pleaded to be ever so valid in point of law, I can*not* understand why it *should* be admitted as a plea in bar of the account, when the very foundation of the complaint against it is not its legal invalidity, but some extrinsic circumstance which renders it inequitable that the plaintiff should be bound by it.

Lord Hardwicke himself, indeed, seems in a considerable degree to have considered the subject in the same light; for, though after having minutely examined all the legal objections to the award, he said "he "was of opinion it was good to a common intent, and "that the plea consequently must be allowed against "the general account;" yet he added, "that the plain- "tiff was not precluded at the hearing of the cause "from objecting to the award for fraud or partiality in "the arbitrators:" which was in effect admitting that the plea of the award should not stand in the way of the plaintiff's having a general account, if he could effectually impeach it from extrinsic circumstances.[1]

In a subsequent case,[2] reported by the same reporter, from whom the two cases immediately preceding are taken, the nature of the bill is not stated; it is simply alleged that the defendant pleaded an award.

The Lord Chancellor says, "a plea of an award is "not only good to the merits of the case but to the "discovery; for a defendant to the bill is not obliged "to set out the whole account between him and the "plaintiff, after an award in his favour, in relation to "that very account, for that is conclusive to all the "parties, till an error is shewn in taking the account, "or partiality and improper behaviour in the arbitra- "tors; and if any particular error is pretended, the "plaintiff ought to charge it with all its circumstances, "nor is he precluded from moving it now if he has "evidence that will amount to it.

[1] Lingwood v. Eade, 2 Atk. 501, (515.)

[2] Tittenson v. Peat, 3 Atk. 496, (529.)

To all these observations, taken as independent propositions, I can easily assent; and if the bill had been merely for an account, without taking any notice of the award, I think they would have been properly used in support of the plea: but Lord Hardwicke's observations in another part of the case, with respect to the grounds on which an award may be impeached, shew that the bill was to set aside an award as well as for an account.

On the supposition that an award *may* be pleaded to a bill filed for the purpose of having it set aside, it has been questioned how far such a plea is proper without containing averments, denying the charges in the bill, of circumstances extrinsic to the award.

In a case at the Rolls, June 1786,[3] it appeared, that to a Bill filed to set aside an award on the ground of collusion, and want of notice to the plaintiff to attend at the making of the award, the defendant pleaded the award, and that the plaintiff had full notice; that an agent from him attended, and there was a full discussion before the award was made. There was also an answer containing similar averments of the fairness of the transactions. It was objected that it was improper these averments should be both in the answer and plea; but his Honour overruled the objection, observing that an award nakedly pleaded would be "exceptio ejusdem rei cujus petitur dissolutio," and is no full bar to the demand without denial of collusion and partiality.

A Bill filed to open an account for fraud stated particular instances of error and fraud in the account, and

[3] Butcher v. Cole, before Sir Lloyd Kenyon, cited 1 Anstr. Rep. in the Exchequer. 99.

that there had been a reference and an award, but charged that there would not have been such an award if papers had been produced which had been withheld by the defendant.

To this bill the defendant pleaded the award, and in the plea also stated a release of the matters contained in the bill.

The Lord Chancellor [4] allowed the plea.[5]

A bill filed in the Exchequer for an account set forth an award, and charged that it was obtained corruptly, specifying the corrupt transaction. The defendant pleaded the award, denying corruption and all the particular instances specially, by way of averment; and also put in an answer to the same points, as the special averments in the plea.

An objection was taken by the Lord Chief Baron,[6] that the answer overruled the plea. It was argued, that it was necessary that the plea should be a complete bar, and also that it should be supported by an answer denying the special charge of corruption; and at all events, if these averments in the plea were not necessary, they were to be rejected as surplusage.

To this the court observed, that the meaning of a plea is to let the party stand upon a single point, which bars the whole demand, without going into an answer as to the rest of the bill; but that this intent would be totally defeated if the plea were allowed to contain averments denying the whole charges of the bill, tending to impeach the award.[7]

[4] Lord Thurlow.

[5] Burton v. Ellerton, 3 Brown Cha. Rep. 196. 16 Jan. 1791.

[6] Eyre.

[7] Pope v. Bush, 1 Anstr. 59.

I apprehend this to be the correct description of a plea; but the true consequence seems to be, not that an award pleaded nakedly is a proper plea to such a bill, but that the award ought not in any shape to be pleaded to a bill filed to set it aside.

A bill filed to set aside an award, and open transactions, stated many circumstances of improper conduct in the arbitrators. The defendant pleaded the award, and in his plea denied collusion, and all the charges of misconduct. To this plea there was joined an answer denying specifically all the same charges, and stating the same things contained in the averments in the plea.

In objection to this plea, the case immediately preceding was cited as an authority; and in favour of it the counsel for the defendant relied on the case at the Rolls.

The court considered themselves bound by their own decision to hold that the award must be pleaded nakedly, but declared they did not mean to extend this rule beyond the case of awards; and thinking it would be too much to overrule a plea on this objection, therefore gave the defendant leave to amend, if the plaintiff should insist upon it, otherwise to be good by consent.[8]

A bill was filed to set aside an agreement and release, stating circumstances of imposition and equitable duress in obtaining them. The defendant pleaded to the whole, the agreement and release: there was no answer, nor was the fraud or duress denied in the plea.

[8] Edmonson v. Hartley, 1 Anstr. 97.

The court overruled the plea, and leave being prayed to amend they refused it, saying it was a practice not to be encouraged.[9]

The defendant put in a new plea, of the release alone, to so much of the bill as sought discovery of *transactions prior* to the agreement, and to the whole relief sought, accompanied by an answer denying the whole equity charged as to the manner of obtaining the agreement and release.[1]

Here it may be remarked, that in the first case the court, by overruling the plea, seem to have acted completely on the maxim "haud competit exceptio ejusdem rei cujus petitur dissolutio;" and that in the second, the *plea* of the release in bar of the discovery of *transactions prior* to the agreement did not contradict that maxim, because it was not pleaded as a reason why the release itself should not be set aside, nor in bar of the discovery of the circumstances under which that and the agreement had been obtained. The court, however, did not enter into the *validity* of the plea: but a motion being made that this second plea and answer might be taken off the file, as being irregular, and contrary to the former order of the court in overruling the first plea, the Chief Baron expressed his approbation of the motion; and the rest of the court doubting, the case stood over, and was never mentioned again.

A bill filed in the exchequer to set aside an award stated that the plaintiff and defendant were partners in

[9] Freeland v. Johnson, 1 Anstr. 276.

[1] Case between the same parties. 2 Anstr. 407.

trade, and agreed to dissolve their partnership, and that to settle accounts amicably they fixed upon two arbitrators. Their award appointed certain persons to collect the effects and pay all the debts, and to pay over the surplus equally between the plaintiff and the defendant. The bill then stated that the receiver had collected the effects, but that there was still a deficiency, the debts not being all discharged; and that several demands had been enforced against the plaintiff, for which he called upon the defendant to contribute. "The bill also prayed that an account might be taken "of the effects of the partnership and of the debts."

To the bill the defendant pleaded the award.

To this plea it was objected that the award supposed a balance in *favour* of the partnership, whereas a deficiency had taken place; that the arbitrators had not provided for this contingency, and of course the award was not final; and that the plaintiff had been called upon by the creditors, and ought to be reimbursed.

The court thought that the bill ought to have *specified* the objections to the award, as a final settlement of the account: that it ought to have set forth the deficiency, and what debts in particular the plaintiff had been called upon to discharge; and that, till these specific objections were made to the award, it must be considered as final. The plea was for the present allowed, but was set down for rehearing. When it came on to be heard again, in addition to the former statement, it appeared, that by the award the arbitrators directed that the partnership should, as between

[a] Routh v. Peach, 2 Anstr. 519.

the partners, be considered as having ended at a day then passed, and that the plaintiff should be at the risk of all debts incurred subsequently to that day.—The bill stated that the debts discharged by the plaintiff, and for a contribution to which this bill was filed, were incurred by the partnership.

The court thought that this *might* apply to debts incurred *after* the day fixed by the award, after which the plaintiff was to stand to the risk of debts: from that day, as between the parties, the partnership was considered as dissolved, but as between them and their creditors it still subsisted. The arbitrators had proceeded on a supposition that the partnership effects were sufficient to pay all demands up to that time, and the court would presume that the supposition was well founded until it was expressly negatived. The order for allowing the plea was affirmed.[3]

Here it may be observed that the court decided not on the ground of the propriety of the plea, but on the defect of allegation in the bill, which might have been the foundation of a demurrer.

An annuity had been granted by A. B. payable out of certain estates, part of which came afterwards to the plaintiff and part to the defendant. Disputes arising about the proportions in which the annuity was to be paid, a bill was filed in the Court of Exchequer: in the progress of the suit the parties submitted to have the matter referred to arbitration, under an order of the court—and an award was made. Another bill was filed, charging that the defendant, in giving in to the arbitra-

[3] Routh v. Peach, 3 Anstr. 637.

tor the particulars of the estate in his hands, wilfully misrepresented its extent and value, by suppressing several parcels, the proportion which each was to pay depending on the relative values of the parcels in their hands. The bill further charged that the plaintiff had not till lately discovered the fraud, and prayed to have the matter opened.

The defendant pleaded the award alone, and did not put in any answer.

The question turned upon the validity of this plea, and cases were cited on both sides. On the behalf of the plaintiff it was observed, "that it was a mere confusion of terms to suppose that an award is a bar to "any inquiry concerning the *mode* in which the award "itself was obtained; that it only barred inquiry into "all the matters submitted to the arbitrator, while the "award remained good, but that even if all was fairly "submitted to him, yet gross and apparent errors in the "award may be set right by a court of equity."

The court thought the charge of concealment ought to be answered; and Mr. Baron Perryn, in particular, said, that the award could not preclude the investigation of that charge—it was exactly "exceptio ejusdem rei "cujus petitur dissolutio."[4]

It seems then to be now settled, that where a bill is filed to have an award set aside, on the ground of extrinsic circumstances, the award cannot alone be pleaded in bar of that prayer without denying the charge of those circumstances, either in the plea or in a distinct answer; but it does not seem now to be considered as material whether it be by the one or by the other, or by both.

[4] Gartside v. Gartside, 3 Anstr. 735.

I can discover nothing in any of the above cases, or in all of them taken together, which shews the necessity or the propriety of *pleading* the award at all in bar to a bill filed to have it set aside. The charges on which the award is impeached *must* be answered, and the denial of them is a *sufficient* answer; the plea, therefore, of the award cannot be *necessary;* and I think, if the nature and office of a plea be considered, it will be manifest that *such* a plea is not *proper.*

"The form of making defence varies according to "the foundation on which it is made, and the extent "in which it submits to the judgment of the court.— "If, on the foundation of *new* matter offered, it de- "mands the judgment of the court whether the defen- "dant shall be compelled to answer further, it is termed "a *plea.*"

"A plea is intended to prevent further proceeding "at large, by resting on some point founded on matter "stated in the plea; and as it rests on that point *merely,* "it admits, for the purposes of the plea, the truth of "the facts contained in the bill, so far as they are not "*controverted* by facts stated in the plea."

"The defence proper for a plea is such as reduces "the cause, or some part of it, to a single point, and "from thence creates a bar to the suit."

"The end of a plea is to reduce the cause, or the "part of it covered by the plea, to a single point, in "order to save expence to the parties, or to protect "the defendant from a discovery which he ought not "to be compelled to make."[s]

[s] Mitford's Treatise on the Pleadings in Equity, 14, 15, 177, 234.

A bill filed to have an award set aside necessarily sets out at least the *substance* of the award; to plead the award itself, therefore, is not "to demand the judg- "ment of the court, on the foundation of *new* matter "offered:" and as the defendant *must* answer the *charges* in the bill, on the foundation of which the plaintiff seeks to be relieved against the award; as the plaintiff may, notwithstanding the fullest denial of those charges by the defendant, still proceed to prove them at the hearing of the cause;[6] and as, in case he be successful, the inevitable consequence is that the award will be set aside, and the parties put in the same situation in which they were before the submission to arbitration: "The cause is not, by the plea, reduced to a single "point; no expence is saved to the parties; nor is the "defendant protected from a discovery from which it was the object of the plea to protect him." (*r*)

[6] Vid. 2 Atk. 521, (506.)

*Of the means of procuring relief when the award under rule of court in Pennsylvania is improperly made.*

(*r*) The submission under the act of assembly authorizes a report *into office*, or a report to the *next term*, or it is general.

When the referees are authorized to report into *office*, they may file their report in the office of the prothonotary in vacation; upon its being so filed a judgment *nisi* is entered upon it, if the report admits of a judgment; and unless exceptions to the report are filed within four days after notice to the party, the judgment becomes absolute, and execution may issue. *Shewell* v. *Wykoff*, 1 Dall. 312.

When the referees are authorized to report to the *next term*, they must file their report during the next term. If it is filed on or before

fore the first Saturday, it is upon that day read in open court, a judgment *nisi* entered thereon, and unless exceptions thereto are filed within four days afterwards, excluding Sundays, the judgment becomes absolute. If filed after the first Saturday, the party is entitled to four days to enter his exceptions after notice of such filing.

When the submission is *general*, the report is made to a term, and is proceeded on as in the last mentioned case.

In submissions of the first and last kind, the arbitrators are not limited as to time, but may report to any term, or in any vacation, until the rule is rescinded. In a submission of the second kind, the rule expires by its own limitation at the next term after it is entered, and the authority of the arbitrators terminates at that time. *Abbot* v. *Pinchin*, 1 Dall. 349. Unless the referees are not appointed until after that term, and then the relation of the phrase, is to the time of their appointment. Vid. *Hart et al.* v. *James*, 1 Dall. 355.

These exceptions which, analogous to a motion for a new trial, are to be filed within four days, must be accompanied by affidavits as to facts not appearing upon the face of the proceedings. *Buckley* v. *Durant*, 1 Dall. 129. Reg. Gen. 17, February 1789, of the Common Pleas of Philadelphia county, to the practice of which court what has been said is intended to apply.

In all these cases if the four days elapse without exceptions, the award of the referees, like a verdict under the same circumstances, cannot afterwards be impeached. But if exceptions are regularly filed, they are set down for argument, and it is upon a motion to set aside the award, that the whole matter comes before the court.

An award or report of referees under this rule of court will be set aside then, not only for any of the causes heretofore enumerated in Mr. Kyd's Treatise, but for a cause which has no such operation in England, as it springs from the language of our act of assembly; and that is, where the referees have acted in *opposition* to the law or the fact, whether they intended it or not, and whether or not it appears upon the face of their report. The act of assembly gives to a report of referees the same effect as a verdict, when it is made according to the submission of the parties, and is *approved of by the*

 *court;*

*court;* and this expression has been held to place a report upon the same footing with a verdict, so far at least as to entitle the court to set it aside where it is plainly against the law or the facts as disclosed to the referees.

The first printed case in which this principle is established, was decided in the supreme court of Pennsylvania, July term, 1788, and is as follows.

The cause being referred, a report was made in favour of the plaintiff, to which six exceptions were taken. The 3d was "That the referees allowed interest upon an unsettled account;" and the 6th, "That they allowed a charge for premium and commissions in making an insurance for the defendant, without requiring the plaintiff to produce the policy, or having any other proof that the insurance was effected than a letter from the plaintiff himself to his partner in Philadelphia, in which he says he has done it." The other exceptions are not material.

In delivering the opinion of the court, M'Kean, C. J. after reciting the act of assembly, says "This act differs essentially from the statute of W. 3. in many respects, but particularly, that to render a report or award valid and effectual, the former requires that it be *approved by the court;* but no such provision is made by the latter, and therefore awards under rules of court are conclusive in England, unless some corruption, or other misbehaviour in the arbitrators is proved. [*But see Kyd, ante* 341. *note* 1. *and* 342. *note* 7.] The courts of equity indeed have taken a wider ground, and wherever a plain error appears, either in fact or in law, it seems they will make it an object of inquiry. 2 *Vern.* 705. 1 *Vern.* 157. 3 *Atk.* 494. From some expressions in the authority, we might presume that the error must be apparent on the award; but as the chancellor at the same time speaks generally, that it must be set forth in the bill for relief, there is at least great room to doubt upon the subject. [*See Kyd, ante* 327. *note* 3. *and* 350. *note* 3. *and* 351. *note* 5.] In Pennsylvania however since the revolution, as the *approbation of the court* is made a necessary ingredient in the confirmation of reports, we have thought it our duty from time to time to inquire into the allegations against them before we gave them our sanction. But in doing this

we

we have always confined ourselves to two points. 1st, Whether there is an evident mistake in matter of *fact*, or 2dly, Whether the referees have clearly erred in matter of *law*. If either of these is satisfactorily proved, the argument is surely as strong for setting a report aside, as where injustice has been done by the corruption or other misconduct of the referees."

"Is it not reasonable indeed that the *same cause* which would induce us *to set aside a verdict*, and grant a new trial, should be sufficient for vacating an award? In the one case the decision is made by twelve men upon oath, with all the information which the judges and learned counsel can communicate; in the other it is the act of three persons who are not sworn to the faithful discharge of their duty, and who are unassisted either in ascertaining the law, or in developing the fact, upon which the question submitted to them may depend. This abundantly shews that the sacredness of awards ought not to be extended beyond that of verdicts, and must justify the court in putting them upon the *same footing* when errors are suggested either in clear points of law or fact. If therefore we would have granted a new trial had the present exceptions been made to a verdict, we ought for the same reason to set aside the report in question."

After stating certain of the exceptions the Chief Justice proceeds—"Thus under the third exception it has been proved by the statement exhibited to the referees, that interest was allowed to the plaintiff upon an unliquidated account, which is contrary to the rule of law, as well as to the repeated decisions of this court.—In *transgressing* this principle the referees have mistaken a clear point of law, which would alone be sufficient for setting aside their report."

"But besides this we find by the evidence under the sixth exception, that they have also allowed the charge of premium and commission for making an insurance, without requiring the policy to be produced, or any proof of its being lost; which is the only evidence that in such cases can be admitted in any court either of civil or common law jurisdiction. It is indeed a fundamental maxim in the laws of evidence (wisely framed for the prevention of fraud,) that the best proof of which the fact reasonably admits ought

to

to be given. This has not been complied with on the present occasion; and the referees in *overlooking it* have violated another plain principle of law." Report set aside. *Williams* v. *Craig*, 1 Dall. 313.

There are two decisions in the common pleas during the time of *President* SHIPPEN, one of which seems to oppose the reasoning of the court upon the *sixth* exception in *Williams* v. *Craig*, and the other states a rule altogether inconsistent with the principle of that case.

The first was decided in March term, 1786. A rule was granted to shew cause why a report of referees should not be set aside on the ground of their having heard a witness *interested in the event of the suit*. In answer to the objection, the court say, "As to the kind of evidence which the referees may hear, there always has been, and must necessarily be in this kind of tribunal, a very great latitude. The parties, generally unassisted by counsel, are permitted to relate their own stories, and confront each other, their witnesses are heard even without an oath, unless the contrary is stipulated, or the referees require it. Books and papers are inspected and examined by them, *without regard to their being such as would be strictly evidence in a court of law*. And this practice being known to both parties before they agree to the reference, and the advantages arising from it being mutual, there seems no just reason to complain of it." Rule discharged. *Hollingsworth* v. *Leiper*, 1 Dall. 161.

The other was decided at December term, 1788, a short time subsequent to the case of *Williams* v. *Craig*.

In delivering the court's opinion upon certain exceptions to a report of referees in the cause, the *President* says, "The determination of causes by reference under a rule of court has been found a practice of such general convenience and utility for the speedy and equitable decision of controversies depending in the courts of law, that the judges have always encouraged and supported it; more especially as in this mode of trial the referees are not tied down by the strict rules of law, but may decide as the equity of the case may appear, and in some sort supply our want of a court of chancery. As the referees are judges of the parties' own choosing, we never enter

enter into the merits of the causes they decide, nor in general set aside their reports *but for misbehaviour, or where the objections arise on the face of the proceedings.*" *Kunckle* v. *Kunckle*, 1 Dall. 364. See also *Dixon's Lessee* v. *Morehead*, Addison's Reports, 223, 4.

But in a subsequent case before the same judge in December term, 1789, the rule as stated in *Kunckle* v. *Kunckle* seems to have been deserted, and that of *Williams* v. *Craig* to have been adopted by the court.

To a report of referees in this cause, it was in substance objected, that to a long account between the parties consisting of items of *specie* as well as of continental money, the referees had applied a scale of depreciation of seventy for one, in consequence of which the credits due to the defendant were very much diminished. SHIPPEN, *President*. The court have deliberately considered this case, and are unanimously of opinion, that the referees, although men of knowledge and integrity, have hastily adopted a principle not warranted by law, which, if sanctioned by this court, would be productive of manifest injustice. The accounts that had been exhibited by one party to the other, were certainly evidence against him who exhibited them as to the articles they contained; but could not be considered as evidence, much less conclusive evidence, of what was not stated or distinguished in them, I mean, the value of the specie and depreciated money. This appears to have been a principal subject of dispute between the parties, and ought to have been open to discussion before the referees. Yet under the idea that this was conclusive evidence, they have totally refused to consider the items of the account as to their real value, or to exercise their judgments upon them, but by applying a certain scale of depreciation to the balance of the whole account, they have involved a large sum of hard money in a depreciation of seventy for one. They have also scaled sums which had been omitted in the accounts, in a very different manner from what they have done other advances made about the same time, by which an unequal measure of justice is dealt out to the parties. The principle that the referees adopted, having been taken up before it could be known on which side it would operate,

either

either beneficially or injuriously, they are not chargeable with any designed partiality, but it was surely too hazardous and uncertain an experiment to be a proper foundation for doing equal justice. Although the court in the present instance have entered further into the merits of the case than they usually do on reports of referees, they do not think they depart from the spirit of former decisions, as they ground their judgment upon the conduct of the referees in declining the consideration of the most material subject of controversy, and that too upon a mistaken principle leading to real injustice to one of the parties." Report set aside. *Pringle* v. *M'Clenachan*, 1 Dall. 486.

Notwithstanding the last clause of the court's opinion, it is evident from the case that the defect did not appear *upon the face* of the award, that there was no charge of *misbehaviour* against the referees, that the error must have been made out to the court by testimony or by the examination of the documents laid before the referees, and that it consisted, as was afterwards said by Judge Washington in the case of *Hurst* v. *Hurst*, not in declining the consideration of a particular subject, but in adopting a principle which when applied to that subject, led to a conclusion not warranted by the rules of law. It therefore justifies the assertion that the rule of *Kunckle* v. *Kunckle* was deserted, and the rule of *Williams* v. *Craig* adopted, so far as it was applicable to the case before the court; and both *Pringle* v. *M'Clenachan* and *Williams* v. *Craig*, evidently shew that an award will be set aside for an error in law though it does not appear upon the face of the proceedings, and without any inquiry, that is without any regard to the fact, whether the arbitrators *misconceived* the law, or whether they knew what the law was and purposely *disregarded* it; precisely in the same manner as a new trial is granted, where a verdict is *against* either the law or the evidence.

These last mentioned cases have been confirmed by a decision in the circuit court of the United States for the district of Pennsylvania, in April sessions, 1803.

In order to support certain exceptions to a report of referees in favour

favour of the defendant in this cause, it was necessary for the plaintiff to go into the examination of the written evidence upon which the referees decided; that he might make out his title to certain credits which the referees had refused, and that he might shew their mistake in charging him with a certain sum mentioned in one of the exceptions. Upon a hint from the court that the attempt thus to impeach an award was unusual, the act of assembly of 1705, and the case of *Williams* v. *Craig* as expounding it, were read and relied upon. The court then suffered the plaintiff's counsel to proceed, reserving the question for further consideration; and in delivering the opinion of the court finally, Judge WASHINGTON says, "The statute of Pennsylvania passed in 1705, declares that where a reference is made under a rule of court, the award of such referees being made according to the submission, and approved by the court and entered upon the record, shall have the same effect and be as available in law as a verdict. The Chief Justice in the case of *Williams* v. *Craig*, determined that where there is an evident mistake in matter of law, or a clear mistake in matter of fact, the court will set aside the award. In the case of *Kunckle* v. *Kunckle*, the president narrowed very much the rule laid down in the above case, by saying that the courts never enter into the merits of the case decided by the referees, or set aside their reports but for misbehaviour, or where objections to them arise on the face of the proceedings. This is the strict rule in England. In the case however of *Pringle* v. *M'Clenachan*, afterwards decided in the common pleas, the court set aside a report because it appeared that the referees proceeded on a mistaken principle, and the mistake, as I understand the case, did not appear upon the face of the award, but upon the evidence which was laid before the referees. Now there is very little difference between this case and that of *Williams* v. *Craig*. In the one as well as in the other, the court corrected a mistake in point of law which did not appear upon the face of the award, but was made out by an examination of the documents upon which the referees had decided. The error committed was not by declining the consideration of a particular subject, but by adopting a principle which when applied to that subject, led to a conclusion not warranted by law."

"The

"The rule in England is I think too rigid to consist with the spirit of the law of this state; that contended for at the bar by the plaintiff's counsel is much too loose. It is too much to say because the court have not drawn the same conclusions as the arbitrators have done, that therefore they will set aside their award. If awards were liable in every instance to be opened, and the questions which they have decided liable to be retried and reexamined by the court, the utility of this mode of deciding controversies would certainly be much diminished. If on the other hand awards were to be considered as too sacred to be impeached in a court of law; if notwithstanding the most glaring mistakes have been made, every door should be closed against the court's arriving at the knowledge of that fact, I should incline strongly to doubt whether this mode of trial by judges of the parties' own choosing would deserve half the encomiums which have been passed upon it. It would be to say that whatever injustice may be committed by the mistakes of arbitrators, yet the court must *approve* and give validity to those mistakes, if the referees are cautious enough not to spread them upon the face of the award. Upon the whole I am perfectly satisfied that the inquiry in this case has been proper; that it was the duty of the court to examine the accounts laid before the referees to see if they had refused to give the plaintiff credits to which he was legally entitled. In such an examination no new evidence can be admitted, and in deciding upon that which was laid before the referees, if they have drawn conclusions from conflicting testimony different from that which my mind would approve, it would be improper on that account to say these conclusions are wrong; if on the other hand plain facts and principles of law have been misapprehended, I cannot say I *approve* of their report." *Hurst* v. *Hurst*.

The award must be in *plain* opposition to the law or the facts, before the court will set it aside. It is not enough that the court may think they would have differed in something from the arbitrators in the conclusions drawn from the facts.

This appears not only in most of the cases heretofore cited, particularly that of *Hurst* v. *Hurst*, but most explicitly in the case of *Jolly* v. *Blanchard*, determined in the same court at April sessions, 1805.

This

This cause having been referred to arbitrators under a rule of court, and a report made, the defendant's counsel moved to set the report aside for manifest error by the arbitrators both in fact and law, in awarding to the plaintiff $1009, the value of a quantity of goods consigned by the plaintiff to the defendant at St. Domingo, upon the principle that he had retained them after he had received orders to send them back, in consequence of which they were seized and destroyed by the brigands;—whereas, as the exceptions set forth, the orders which he received were not peremptory, but left the defendant at liberty to return or retain the goods as he pleased; and independent of this, the defendant had made advances for the plaintiff to the amount of about $400, which gave him a lien of which he could not be deprived, or censured for not parting with it.

The arbitrators were examined as to the grounds of their decision; and they stated that they were of opinion that the defendant ought to have sent back the goods as soon as he received the plaintiff's orders, and that it was in his power so to do. That the only reason assigned by defendant for not having sent back the goods was his lien; but the arbitrators thought he might have retained enough to satisfy his advances, and should have returned the others, or sent them to his own consignee to be delivered to the plaintiff on being satisfied his advances. They agreed in their statement, that the defendant relied very little upon any other ground for his conduct than the lien.

By the correspondence laid before the arbitrators, it appeared, that on the 11th April, 1803, the plaintiff wrote to the defendant that he had seen some of his account sales sent in to another house, and hoped that he should receive more favourable accounts of the sales of his cargo: that if there was not a probability of selling them, rather than make so great a sacrifice or any thing like it, he would prefer having them sent back. He adds, "you will therefore I hope study our interest very attentively." On the 16th June, the plaintiff in another letter expresses his apprehensions that war would take

place between England and France; and supposing that property at the Cape would be more safe from the brigands in the hands of an American than a Frenchman, suggests the policy of depositing his goods in that way, but leaves every thing to his discretion, in full confidence of his doing the best for the plaintiff's interest. On the 8th July, the plaintiff says, "It is now certain that war has commenced between Great Britain and France. Upon the slightest danger of the French evacuating St. Domingo, ship my goods to America, but I hope before this they are sold." On the 17th September, he says, "as defendant had refused to make an advance on the goods, and had not complied with his request, he should hold him liable if any accident befel them."

The plaintiff's letter of the 14th April got to hand the 19th June, and the defendant says, that after having paid high duties on the goods it would not be to the interest of the plaintiff to reship them. He hopes to sell now and then by small parcels. He says however, that if the plaintiff insists upon the goods being shipped, he the defendant will do so.

On the 25th July the plaintiff's letter of the 16th June got to hand; and defendant says that he does not know if war is positively declared, though it may be considered as certain, many hostilities having been committed on our coasts; speaks of the consequent distresses of the island; says he will neglect nothing in his power to make the plaintiff's goods safe by putting them into the hands of an American merchant as requested.

*Washington* J. "The letters from the plaintiff left, in my opinion, a great deal to the discretion of the defendant. If they could not be sold without sacrifices being made, the defendant was bound to reship them, and in case of war he advised that the goods should be placed under the care of some American merchant. This is the substance of the two letters of the 14th of April and the 16th June. The letter of the 8th July is more positive in ordering the goods to be reshipped in case of danger that the French would evacuate the island.

island. The defendant's answer to the plaintiff's first letter, seems to assign a plausible if not a very good reason for retaining them, and the new order contained in that of the 16th June, the defendant promises to obey in his answer of the 29th July. When the defendant received the plaintiff's letter of the 8th July does not appear, neither does it appear when the prohibition took place. But it is obvious from the defendant's letter of the 29th July, that although he had not certainly heard of a declaration of war between England and France, yet that partial acts of hostility had occurred on the coasts of St. Domingo, and he states the commercial embarrassments they had produced in pretty strong colours. But whether under all circumstances it would have been most prudent to ship the plaintiff's goods to America or to retain them, might be extremely questionable. If I were called upon to decide upon the correspondence, I might probably differ in opinion from the arbitrators. But ought I for this reason to set aside their award.

" In the case of *Walker* v. *Smith* the court refused to grant a new trial, although we were not satisfied with the verdict, and where we had heard the whole evidence laid before the jury. But in this case the arbitrators had the advantage of hearing the observations and acknowledgments of the defendant himself, as to the motives of his conduct, and it appears that they were in some measure governed in their opinions by this species of evidence.

" It was perhaps not going too far for the arbitrators to conclude from the excuse so entirely relied upon by the defendant, that no other existed, and that if it had not been for his claim upon the goods for securing his advances made on account of the plaintiff, he would have considered himself bound by the orders he had received to return the goods. But this excuse was by no means a sufficient one, and I think the arbitrators upon this point were perfectly correct. An agent has a lien upon the property of his principal for any balance due him; but if he is ordered to part with the possession of such property, shall he disobey those orders and retain goods to an immense amount in order to satisfy an inconsiderable debt? The

defendant

defendant might have retained such a part of the goods as would have been sufficient to secure him, or might have consigned the whole to his friend here to deliver up on being paid what was due.

"Upon the whole, I do not think the arbitrators have been guilty of those *obvious* mistakes in matters of law or fact, which ought to invalidate their report."

It was not practicable to abridge the above case, with any profit to the point for which it is cited; it stands altogether as a clear justification of the position, that not a mere difference of opinion between the court and arbitrators as to the effect of testimony, but a plain obvious opposition to law or fact in the report, is required to maintain a motion to set the award aside.

This plain mistake must also appear on the face of the award, or it must be explicitly set forth in the exceptions; for upon a general allegation of a plain mistake, the court will not search for such a one, with a view to defeat the award.

In "*The Trustees of Lower Dublin Academy* v. *Paul*, determined in the Supreme Court September term, 1803, the exceptions to the report stated no plain mistake in fact or law, but that the referees had gone wrong in law generally; and it was moved to postpone the consideration of the award upon the ground that an absent referee was a material witness for the party excepting. But the motion was dismissed by the court, who said it was essential that a plain mistake should be pointed out. They would no doubt examine the referee, to ascertain whether the allegation of the plain mistake could be maintained; but the referee if present, could not be questioned, unless a specification of the mistake was before the court.

But on the other hand, the court will not listen to an application by referees for instructions on points of law, to guide them in making their report. They must first, say the court, exercise their judgment upon the lights they have received, and the question being afterwards brought regularly before us, we will determine whether they have acted right or not. *Guyer* v. *Smith*, 1 Dall. 347. Vid. *Street* v. *Rigby*, 6 Vez. jun. 821.

## CHAPTER VIII.

### THE EFFECT OF THE AWARD IN PRECLUDING THE PARTIES FROM SUING ON THE ORIGINAL CAUSE OF ACTION, WHICH WAS THE SUBJECT OF THE REFERENCE.

AS the object of every reference to arbitrators is to have an end put, by the decison of a domestic tribunal, to all controversy respecting the subject referred, no rule is more consonant to good sense than that which precludes the one party from harassing the other with an action on the original subject of dispute. The ancient law, accordingly, provided a remedy by action for him who was so harassed; for as soon as he was sued on the original cause of action he might sue out a special writ of trespass on the case, which is to be found in the Register,[1] by the name of *Breve de Arbitratione factâ*, on which he might recover damages for the vexation; and it were good, says Lord Coke, that some one would sue that writ.[2] The wisdom of his Lordship's observation is, however, very questionable, as the defendant has a much less expensive, and

[1] Reg. Br. Orig. 111. a. [2] 3 Bulstr. 68, (66.)

a much more speedy remedy, in the privilege of pleading the award in bar of the plaintiff's action.

To what action an award may be pleaded in bar it is not necessary here to point out; that question will be sufficiently answered by a perusal of the chapter on the subject of reference,[3] an award being pleadable in bar to every action brought on a question which may be referred to arbitration.

The question, what award may be pleaded in bar admits in general of an answer equally short; it must have all the qualities necessary to constitute a good award, and must be such, if it be pleaded without performance, that the plaintiff may have a remedy to compel performance: but, if performance be alleged, a void award may frequently be a good bar. An award, however, which is in itself uncertain, and cannot be ascertained by averment, cannot be pleaded in bar.— To an action of assumpsit for work and labour done, the defendant pleaded an award "that the plaintiff should be satisfied for the days work and task work he had done for the defendant; but no value was put, by the arbitrator, on the work; and that then the plaintiff should pay to the defendant 25*l.* and give him a general release of all controversies:" the defendant then averred that the task work and days work were worth 12*l.* 10*s.* and no more, and that he had paid and satisfied the plaintiff that sum. But the plea was overruled, because the arbitrator himself had not valued the work.[4]

[3] Cap. 3. page 50 et seq.

[4] Pope v. Brett, 2 Saund. 292. 2 Keb. 736. vid. 1 Keb. 754. Dudley v. Cole.

Where an award, it is said, creates a new duty, instead of that which was in controversy, the party has a remedy on the award, and therefore if he resort to an action on that which was referred, the award is a good bar to that action: but where the award does not create a new duty, but only extinguishes the old by release, the award is no bar to an action on the original demand. On this principle, where an action of assumpsit was brought on an agreement for the delivery of a certain quantity of hops, and the defendant pleaded a submission to arbitration, and an award that each should give to the other general releases, and shewing that he had always been ready, and still was, to sign and seal a release; this was held to be no bar, because nothing, it was said, was awarded in satisfaction.[5]

On the same principle, it has been said, an award "that all suits shall cease," though good to make the party forfeit his bond, if he proceed in the suit, yet is not a good plea to the original action, because it is a thing always executory and at the will of the parties, and there are no means at law to enforce the performance of it.[6] Both this and the case immediately preceding, however, seem altogether irreconcileable with good sense. What reason can be given, why an award should be considered as good, for the purpose of making the party forfeit his bond by a breach of it, and yet that he should not be permitted to plead it in bar of an action for the original cause? While indeed it was held that no action could be maintained on an award

[5] Freeman v. Bernard, 1 Ld. Raym. 248. 12 Mod. 130. 1 Salk. 69. Comb. 440.

[6] Lutw. 56, 57.

to do a collateral thing, unless the submission was by bond, it was perfectly consistent with reason that such an award should be no bar to the original action, unless performance of it were shewn on the part of the defendant who pleaded it: the purpose of the submission was to decide, whether either of the parties was entitled to complain against the other, to give *him* a recompence, to *whom* the arbitrator thought it was due, and by that recompence to put an end to the disputes submitted: if therefore performance could not be compelled, it was reasonable, the plaintiff should not be precluded from prosecuting his action for the original complaint. But, after it came to be held that there was a remedy on an award of a collateral thing, though the submission was not by bond, it seems altogether inconceivable, why any case should be excepted, in which the award should not be a good plea. If the party, on an award that all suits shall cease, must forfeit his bond, by going on with his action, or where it is that he shall give a release, by not giving that release accordingly; or if, where the submission is verbal, an action may be maintained on the submission, for a breach in continuing the action, or not giving the release; why should not the award of the one or of the other be a good plea to an action for the original cause?

An award, which does not extend to the whole of the thing demanded, is not a good plea to an action on the demand.[7]

To an "indebitatus assumpsit," and "quantum meruit" for work done, and goods sold and delivered,

[7] Farrer v. Bates, Al. 5.

the defendant pleaded an award, by which, it was ordered that the plaintiff, for the work done, should accept a bill of sale before made, of the eighth part of the ship "Fortune," or a like bill of sale to be made, and that the plaintiff and defendant should give each to the other a general release; among other exceptions to this award as a plea, one was that, nothing being awarded for the goods sold and delivered, the award did not give a satisfaction for the *whole* demand; for that, according to a former case, the general release was not of itself a satisfaction. But had the bill of sale, it was said, been awarded in full of all demands, then the award would have been a good plea to the whole, because it would have been in satisfaction of all demands.[8]

Where the plaintiff lays several counts in his declaration, and the award, from the terms of it, can only be a bar to one of them; if, in reality, they are all for the same cause, the best way of pleading seems to be, to plead the award to that count, to which, in terms, it is an answer, and the general issue to the rest. Thus, in the last case, the award might have been pleaded to the count for work and labour, and the general issue to that for the goods sold and delivered.[9]

In an action of account the plaintiffs declared against the defendant, as bailiff, charging him with several parcels of goods, which he had received for merchandizing: the defendant pleaded that the plaintiffs and he had submitted to arbitrators, with a submission over to an umpire; that the arbitrators made no award;

[8] Clapcott v. Davy, 1 Ld. Raym. 612. [9] Sem. Ld. Raym. ibid.

but that the umpire had awarded that all suits should cease; that the plaintiffs should pay the defendant 30*l.* and should receive their goods left in the hands of one Warren for their use; that if one of the plaintiffs should, within four months after the date of the award, make oath that he had discharged two tons freight at 16*l.* per ton, then the defendant should have no more money than the 30*l.* unless, within ten days after the four months, he should make oath that he took the two tons only at 10*l.* per ton; and then the plaintiffs, or some of them, should pay him 12*l.* more; and lastly, that the parties should give mutual releases. The plaintiffs demurred, and the defendant joined in demurrer. The Chief Justice[1] pronounced judgment in favour of the plaintiffs, but without stating his reasons; but the reporter[2] has thought proper to give us his own argument in favour of the plaintiffs. It was acknowledged, he says, that as to the ceasing of all suits, and the giving of mutual releases, the award was good to bind the parties to performance; but it was insisted, that, had nothing else been awarded, the award for these would not alone have been a sufficient plea: it was also objected that the part which related to the two tons' freight was apparently absurd and unreasonable, and that therefore the award in that particular was void. But the principal objection was to that part which directed the plaintiffs to receive the goods which had been left in the hands of Warren for their use: this was evidently meant as an equivalent to them for the payment of the 30*l.* and if there was

[1] Treby. [2] Lutwyche.

any foundation for what was alleged on this head, that the execution depended on the mere good will of the defendant, because Warren might not deliver the goods without his order, and the law gave no remedy to compel the delivery of them, or to procure satisfaction for the nondelivery, undoubtedly the award ought not to have been a bar to the action of account; because, as was justly observed, all the things awarded to be done in favour of the plaintiffs were but one intire and complete satisfaction for their demand: but if, in truth, the award, "that the plaintiff should receive the goods," ought to have been construed that the defendant should deliver them, or procure them to be delivered, and if an action on the award in which the breach might have been assigned in the nondelivery, could have been maintained against the defendant, there seems to have been no good reason for the judgment.[3]

A defendant, to an action of trespass, may sometimes plead an award made on submission by the plaintiff and a stranger. Thus, to an action of trespass for trampling down the plaintiff's grass with cattle, the defendant pleaded that at the time of the trespass committed, the cattle were in the custody of a stranger, and that the plaintiff and that stranger had submitted to the award of a certain person, who ordered the stranger to pay the plaintiff a certain sum, in satisfaction of the trespass, which he had accordingly done; and this was held to be a good bar to the action.[4]

[3] Dighton et al. v. Whiting, Lutw. 51.

[4] 7 H. 4. 31. b. Brooke, 44 b. pl. 48. Rol. Arb. 2 B. 1.

The defendant may also plead that the trespass, of which the plaintiff complains, was committed by the defendant and another; and that the matter was afterwards submitted to arbitration, by the plaintiff, the defendant, and the other trespasser.

The plaintiff declared in trespass for taking away and detaining his wife for four months against his consent, by which he lost the comforts of matrimony: the defendant, after imparlance, pleaded, as to the force and arms, not guilty, and as to the residue, that the trespass of which the plaintiff complained, was committed as well by the defendant as by one H. Martin, and that after the trespass aforesaid, and since the last continuance, particularizing the day, the plaintiff, the defendant, and H. Martin, submitted to the arbitration of three persons the trespass aforesaid, between the plaintiff, and the same defendant and H. Martin, and divers suits then depending between them: that the arbitrators had awarded that the defendant and H. Martin should pay to the plaintiff, or tender to his use, 7*l.* on the third of June, and two intire third parts of all the costs of the plaintiff, in and about the said suit, payable to his attorney, after the bill produced; that they had tendered the 7*l.* on the third of June, but the plaintiff had refused it, and that no bill of the costs had hitherto been produced. On demurrer, this was held a good plea, though it was objected that the declaration had charged the defendant for a particular fact of his own, namely, the taking away of the plaintiff's wife and the detention of her for four months; that the detainer by the defendant could not be committed by H. Martin, and therefore the suit against the defendant for that fact could not be a suit depending

between the plaintiff and the defendant and H. Martin: but the objection was overruled, for this reason, that the submission was to be construed of all actions between them or any of them.[5]

To an action brought after the submission, and before the award made, the defendant may plead that submission, and that the arbitrators have not yet made any award; provided no day be limited for the making of it: but if a day be limited, then he can only have the benefit of this plea, before that day.[6]

But in order to make an award a good plea, it must appear that the plaintiff and the defendant were equally bound by it. To an action of trespass against C. P. he pleaded that the plaintiff had formerly brought another action against the present defendant and one J. P. on which the plaintiff and the said J. P. had submitted all manner of trespasses and actions between them, and also all other trespasses committed between the plaintiff and the present defendant; that the arbitrators awarded, that as well for the trespass of the present defendant as that of J. P. there should be paid to the plaintiff 100*l.* which had been paid: it was held that this was not good, pleaded as an award, because there was no submission of the defendant, and therefore he was not bound by it: but it was held that it would have been a bar to the action, if pleaded as an agreement of the plaintiff.[7]

In pleading an award, the defendant, it is said, must shew the place where the submission was made, and

[5] Thomlinson v. Arriskin, Comyns, 328.

[6] 13 R. 2.

[7] 20 H. 6. 41. Fhbt. 51. b.

the names of the arbitrators, but that it is not necessary, in averring the payment of money in pursuance of an award, to state at what place nor at what time it was paid;[8] nor at what time the award was made.[9] A difference is made in the old books, in the manner of pleading an award in a declaration, and in a plea.—In the first case, the plaintiff must shew for what cause they submitted, but in the second, it is sufficient for the defendant to allege the submission generally.[1] But it seems at least necessary that it should appear by the plea, that the submission comprehended the subject on which the action is brought, otherwise it can be no plea to that action.

There were formerly some distinctions in the manner of pleading an award, with respect to the necessity of alleging performance of the things awarded, which, though of importance then, are not now essential.

The most general distinction, was between the case where the party in whose favour the award was made, had a remedy to compel performance, and that where he had not. In the former the award itself was considered as a sufficient answer to an action on the subject submitted; but in the latter, it was necessary that he should also shew performance on his part;[2] because it was considered that if there was no remedy for the thing awarded, it remained in the power of the defendant whether he would satisfy the plaintiff or not.[3]

[8] 8 H. 6. 25. b. 9 H. 6. 5. Brooke, 44. a.

[9] Per Brigges, 21 E. 4. 41. b. ad quod non fuit responsum.

[1] Br. 34. cites 5 E. 4. 1.

[2] 43 E. 3. 33. 45 E. 3. 16. b. 13 H. 4. 12. 9 H. 6. 50. b. 19 H. 6. 36. 9 E. 4. 44. Fhbt. 52. b. Br. 45. a. Rol. Arb. X. 3. 6.

[3] 6 Mod. 221.

There was, however, one exception from this case, which was, that, when the thing, awarded to be done on the part of the defendant, was to follow the performance of something on the part of the plaintiff, it was sufficient for the defendant to allege a default on the plaintiff's part, and to say that on performance by him, he was ready to perform his part.[4]

This distinction principally prevailed between the cases of a verbal submission, and a submission by bond. In the latter the plaintiff had always the means of compelling performance of the award, by suing for the penalty of the bond: but in the former, unless the award was for the payment of money, the plaintiff had no remedy on the award, and, therefore, it was reasonable that the defendant in pleading the award and submission should shew performance.[5]

In the case of an award for the payment of money on a parol submission, there was also a difference in the manner of pleading, when the money was ordered to be paid on a particular day, and when there was no time limited for the payment.

In the latter case it was necessary for the defendant to allege at least that he always had been, and still was ready to pay; and there are some cases reported, from which it might be concluded that an allegation of actual payment was necessary; but that seems to have been carrying the point too far, because the plaintiff might at any time have had his remedy on the award.[6]

[4] 20 H. 6. 18, 19. Br. 44. a. 248.
36 H. 6. 15. Brooke Arb. pl. 28.
[5] 9 E. 4. 44. Vid. 1 Ld. Raym.
[6] Vid. the places before cited.

Where the award was for the payment of money at a certain day; in pleading this award, it was sufficient to allege that the day was not come.[7] But even in this case, if the day was past, he must have shewn that on or before the day he had paid the money, or that he had tendered, but that the plaintiff had refused it; for, it was said, though the plaintiff might have debt on the award, yet the defendant could not compel the plaintiff to have recourse to that action, and be barred of his action for the original cause: it was his own default that he had not paid the money at the time appointed.[8]

But these distinctions hardly any longer exist; for since it has been held that an action will lie on the mere submission, it is in no case necessary for the defendant, in pleading an award in bar of an action, to allege performance of the thing awarded, unless where the award is void, and consequently the plaintiff could not enforce it.[9]

---

Such is the general System of the Law of Awards; a system which, in many instances, with much difficulty purified from the unintelligible jargon of technical argumentation, has been, in modern times, established

[7] 22 H. 6. 52. b. 5 E. 4. 7. Rol. Arb. Z. 3. 46 E. 3. 17. b. Rol. Arb. X. 5.

[8] 49 E. 3. 3. 21 E. 4. 42. b. Rol. Arb. Z. 1. 1 Keb. 848. Vid. all these distinctions pointed out, Lutw. 781, Russel v. Williams.

[9] Vid. 1 Ld. Raym. 122.

on the principles of sober reason and sound sense; a system, which, were the parties submitting always certain of appealing to a judge of perfect wisdom and incorruptible integrity, would be highly beneficial to society: but which, from the weakness and depravity of men, frequently becomes the instrument of the most flagrant injustice, and the most serious oppression. From the manner in which arbitrations are often conducted, the parties, instead of obtaining a speedy determination to their disputes at an easy expence, are frequently altogether disappointed, by having no determination at all, and frequently involved in a most expensive and tedious litigation, which might have been avoided, had they chosen at first to have recourse to the ordinary tribunals of the country. The only subjects, which are proper for arbitration, seem to be long and intricate accounts; disputes of so trifling a nature, that it is of little importance to the parties in whose favour the decision may be given, provided, at all events, there be a decision; and questions on which the evidence is so uncertain, that it is much better to have a decision, whether right or wrong, than that the parties should be involved in continued litigation.

# APPENDIX.

SINCE the greater part of the preceding work was printed I have seen a manuscript report of a case in the Common pleas, in the time of Lord C. J. Willes, in which it was determined, on the authority of several old cases, that in the case of a submission by bond the arbitrators cannot award the costs of reference unless power be expressly given to them for that purpose.

John Chandler v. John Fuller, Hil. 11 G. 2.—If this be still considered to be the law, then what is said in pages 152, 153, must be considered as erroneous.—Wishing to ascertain what is generally understood on this subject, I have looked for decisions of a more modern date. I have found none, where the submission has been by bond; but I have found two where the reference has been by rule of court or under the order of a judge. The first is the case of Brown v. Marsden and others in the Common Pleas, May 18, 1789. 1 H. Black. 223. The cause being at issue, the parties submitted to arbitration. The arbitrator awarded to the plaintiff 24*l.* damages, and the "*costs by him sustained in the said action*, to be taxed by the proper officer."—The prothonotary refused to allow any other costs than those of the

action as between party and party; an application was made to the court for a rule to shew cause, why the prothonotary should not be directed to tax and allow the costs of the *reference*, together with the costs of the action, as between attorney and client.—But the court said there was no precedent for the costs of the reference being included in an *award* of costs of the action, and on examining the award, finding the words to be as above stated, held they were *confined* to the costs of the action, and therefore refused the rule.

Here it is to be observed, that it does not appear in the report, whether, by the rule of reference, any power was expressly given to the arbitrator over the costs of the reference, or whether having been expressly given, he had not used it: if the former was the case, this decision is almost an authority that the arbitrator has impliedly a power over such costs; for the court made no question as to the existence of that power, but inquired merely whether he had exercised it.

The second is the case of Bradley v. Tunstow, May 20, 1797, reported in Puller and Bosanquet's Term Rep. of the Common Pleas, p. 34.—By an order of the Chief Justice, made with the consent of the parties, it was ordered, "that the debt for which the action was "brought should be referred to F. C. Esq. to settle and "determine how much, or whether any and what sum "was due to the plaintiff from the defendant, and that "for what sum he should find due, the plaintiff should "be at liberty to enter up his judgment, and *sue out* "*execution* for such sum so found due, together with "*his costs*, provided the said debt so to be settled and "ascertained should amount to 40*s*."

The arbitrator awarded 40*l.* 14*s.* for the debt, and *costs* to be taxed by the prothonotary. His taxation included the costs of the *reference;* the plaintiff entered up judgment on this *allocatur;* the defendant applied to the prothonotary to strike out the costs of the *reference*, who, on reconsidering the matter, accordingly disallowed them.—On the part of the defendant, an application was made to the court, to have the judgment set aside as irregular, in consequence of this disallowance.—To this application, it was answered, that where a cause was referred to arbitration, the costs of the cause to abide the event, and nothing said in the rule about the costs of the reference, these became part of the costs of the cause, and that such was understood to be the practice of the court of King's Bench.

The C. Justice[1] said the whole difficulty arose from the *supposed* practice of that court. If that court had sanctioned the practice of including the costs of reference under a condition in the rule, relating to costs generally, he did not feel himself at liberty to speculate upon the point: it appeared however to him, that a reference being made for the convenience of *both* parties, the expences *ought* to be sustained by both. A provision for the costs of reference being generally made in the rules, but omitted in the present instance, was a strong argument to shew that they were not here intended to abide the *event* of the arbitration.

Buller J. observed that the general practice in drawing up these rules was to distinguish between the costs of the *reference* and the costs of the *cause;* that the

[1] Eyre.

latter usually abided the event of the arbitration, the former not. Here that distinction was omitted; it was referred to the arbitrator to determine the sum due between the parties, and the *costs* were to follow the event of his award: he was inclined to think the practice of the court of King's Bench as suggested, was right. Did the term *costs* mean *all* costs? He did not see how to distinguish between the costs of the *cause* and those which arose in the *progress* of the cause.—But as these costs of reference amounted sometimes to very hard sums, it might perhaps not be foreign to the purpose to suppose, that they were purposely omitted in this rule to avoid the possibility of such expence; if there were any authorities on the subject, he thought the court must be bound by them.

The prothonotary being desired to inquire concerning the practice of the King's Bench, afterwards reported that he had been informed by the Master that though no case had occurred within his knowledge, where this question had arisen under the order of a judge; yet it was generally understood that an arbitrator had *no power* to give the costs of the award, unless under a provision inserted in the order of *nisi prius*.

In consequence of this report, the court directed that the plaintiff should move to reform his judgment by consent, and reduce it to the proper amount.

Here again it may be remarked, that the *real* question arising out of the case was not *on the power of the arbitrator over the costs of the reference, when nothing on that subject was said in the rule*, for *he* had in fact exercised no jurisdiction on the question: but whether, when the rule mentioned costs generally, without dis-

tinguishing between the costs of the cause and the costs of the reference, the latter were necessarily included as well as the former; and it might have been decided that they were *not*, without prejudice to the power of the arbitrator over them, if he chose to exercise it: but, if what the prothonotary reported from the Master of the King's Bench be correctly stated, he went beyond the question submitted to him: and if he be right, the necessary conclusion is, that the arbitrator cannot give the costs to either party unless a power be expressly given him for that purpose in the rule.

## PRECEDENTS.

### COMMON BOND *of* ARBITRATION.

KNOW all men by these presents that I A. B. of C. in the parish of, &c. in the county of, &c. gentleman, am held and firmly bound to E. F. of G. in the city of London, merchant, in the sum of 500*l.* of good and lawful money of Great Britain, to be paid to the said E. F. or to his certain attorney, executors, administrators, or assigns, for which payment, to be well and faithfully made, I bind myself, my heirs, executors, and administrators firmly by these presents, sealed with my seal, dated the day of in the year of the

reign of our Sovereign Lord George the Third, by the grace of God, of Great Britain, France, and Ireland, King, Defender of the Faith; and in the year of our Lord one thousand seven hundred and ninety-nine.

The condition of this obligation is such, that if the above bounden A. B. his heirs, executors, and administrators, on his or their parts and behalfs, shall and do in all things well and truly stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, and final determination of M. N. of, &c. and P. Q. of, &c. arbitrators, indifferently elected and named, as well on the part and behalf of the above bounden A. B. as of the above named E. F. to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties, so as the said award be made in writing, under the hands of the said M. N. and P. Q. and ready to be delivered to the said parties in difference, or such of them as shall desire the same, on or before the day of then this obligation to be void, or else to remain in full force.

Sealed and delivered, being first duly stamped, in the presence of

400

*Condition of an* Arbitration Bond *for settling the accounts of executors; obligation to be from* E. *the executor of* B. *to* D. *widow of* A. *and to* A. *the son of* A. *and* D. *in* 2000*l.*

WHEREAS the above named A. the father, deceased, by his last will and testament in writing duly executed, bearing date on or about —— did, among other things, make and appoint the above named B. together with C. Esquire, executors and trustees of his said will, during the minority of the above named A. his son, for the intent, and purposes therein mentioned and expressed, as by the said will by them the said executors may appear; by virtue of which will and executorship they the said B. and C. severally possessed themselves of great part of the personal estate late of the said A. the father, and also received great part of the rents of his real estates, and have since respectively paid, applied, and disposed of great part of the said estate so by them received, upon the trusts of and according to his said will. AND WHEREAS the said A. the son, having attained his age of 21 years, an account of what was by him the said C. received, and which remained in his hands of the real and personal estates late of the said A. the testator, having been then stated, settled, and allowed by and between them the above named D. A. her son, and the said C. and he the said C. having accounted for and paid what was by him so received and remaining in his hands to them the said D. and A. according to the true intent of the said will, they the said D. and A. her son, have given a full release and discharge to the said C. of all their demands, relating to his acting in the said executorship and trusts, by the

said will in him reposed: AND WHEREAS the said B. sometime since departed this life, having first made and duly executed his last will and testament in writing, and thereof appointed the above bound E. executor, as by the same will by him duly proved may appear: AND WHEREAS the said B. in his life time, as being the other executor of the said A. the father, did receive, pay, and apply some part of the real and personal estate of the said A. the father, pursuant to the trusts in the said will contained; but he the said B. dying in the minority of the said A. the son, and no account having been made and settled as to what was by him the said B. so received and paid out of the said estates; and he the said E. as executor and representative of the said B. being now liable to make up such account, and to answer and pay the balance thereof, unto them the said D. and A. her son (if any such shall appear due), and such account having been by him the said E. delivered to them the said D. and A. her son, and some disputes and differences having arisen between them, touching some articles and vouchers in the said account mentioned and contained: they the said E. and the said D. and A. her son, for the ending and preventing of all further and future disputes, controversies, actions, and suits, touching the same account, have mutually agreed to refer the same to the arbitrament and determination of F. of, &c. (a person chosen by, for, and on the behalf of the said E.) and to G. of, &c. (a person chosen by, for, and on the behalf of them the said D. and A. her son); and in case the said arbitrators cannot determine the same, that then the same shall be fully ended and determined by a third person, to be by them chosen as an umpire, in such manner as hereinafter is

in that behalf mentioned and expressed: NOW THE CONDITION, &c. that if the said E. his heirs, executors, and administrators, and every of them, shall and do, for and on his and their parts, in all things stand to, obey, abide by, perform, fulfil, and keep the award, arbitrament, order, determination, and judgment, which shall by them the said F. and G. be made of and concerning the said account of him the said E. so delivered as aforesaid, and of and for all and every the articles, vouchers, and things therein contained, and of all disputes, differences, actions, suits, claims, and demands whatsoever, touching or concerning the same, so as such award, arbitrament, determination, and judgment of the said arbitrators, of and in the same premises, be by them made in writing under their hands and seals, ready to be delivered to all the parties in controversy within one month next ensuing the date hereof: AND if they the said arbitrators cannot agree, and determine the same premises within the said one month, that then if the said E. his heirs, executors, and administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide by, perform, fulfil, and keep the award, arbitrament, and umpirage of such third person and umpire, as they the said arbitrators shall indifferently name, elect, and choose for the ending and determining of the same premises, so as such award, umpirage, and judgment of the said umpire of and in the same be by him so made in writing under his hand and seal, ready to be delivered to each of the said parties in controversy within — days next after the end of the said one month, the said obligation shall be void and of no effect; otherwise the same shall remain in full force and virtue. WOOD.

BOND *from* J. H.—J. M. *and* JANE *his Wife*, J. S. *and* C. H. *Spinster, to* T. H. *Yeoman, in the Penal Sum of* 1000*l.*

CONDITION.

WHEREAS divers differences, disputes, and controversies have arisen between the above-bounden J. H.—J. M. and Jane his wife, J. S. and C. H. and the above named T. H. as to their several and respective claims and interests under the several and respective wills of T. T. late of, &c. deceased, G. H. late of, &c. deceased, and Joseph H. late of, &c. deceased, and they have severally and respectively agreed to submit the same to the arbitrament and final determination of R. G. of, &c. D. R. M. of, &c. and P. S. of, &c. and that their award, or the award of any two of them, shall be final and conclusive both at law and in equity, as well on the part and behalf of the above bounden J. H.—J. M. and Jane his wife, J. H. and C. H. their heirs, executors, and administrators, as on the part and behalf of the above named T. H. his heirs, executors, and administrators: NOW THE CONDITION of the above written obligation is such, that if the above bounden J. H.—J. M. and Jane his wife, J. S. and C. H. their executors and administrators respectively do and shall, on his, her, and their several and respective parts and behalfs, in all things well and truly stand to, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, and final determination of the said R. G. D. R. M. and P. S. or of any two of them, arbitrators, indifferently chosen, elected, and named, as well by and on the part and behalf of the said J. H.—J. M. and Jane his wife, J. S. and C. H. as on the be-

half of the above named T. H. to arbitrate, award, judge, and finally determine concerning all and all manner of claim and claims, which they, or any, or either of them, have, or pretend to have, by, from, or under the above-mentioned wills, or any or either of them, so as the award of the said arbitrators, or of any two of them, be made in writing, indented under their hands and seals, or under the hands and seals of any two of them, ready to be delivered to the said parties in difference, on or before the first day of March now next ensuing, unless they, or some or one of them, shall be prevented from so doing by sickness or some other unavoidable event; but if the said arbitrators, or any or either of them, shall be prevented, by sickness or any other unavoidable event, from making such their award by the time aforesaid, then, if the above bounden J. H. J. M. and Jane his wife, J. S. and C. H. their heirs, executors, and administrators, shall respectively well and truly stand to, abide by, obey, perform, fulfil, and keep the award, arbitrament, and final determination of the said R. G.—D. R. M. and P. S. or of any two of them, of and concerning the premises, so as they the said arbitrators, or any two of them, make their award in writing, indented under their hands and seals, ready to be delivered to the said parties in difference within the time or space of two calendar months from the said first day of March, then the above-written bond or obligation to be void, otherwise to be and remain in full force and virtue. And it is hereby agreed, by and between all the said parties in difference, that these presents, and this submission hereby made of the said matters in controversy, shall be made a rule of his Majesty's Court of King's Bench, to the end that the

said parties in difference may be finally concluded by the said arbitration by these presents intended, pursuant to the statute in such case made and provided.—IN WITNESS, &c.

### TIME *enlarged by* ENDORSEMENT.

KNOW all men by these presents, that we the within named J. M.—Jane M.—J. S.—C. H. and T. H. have, for ourselves separately, severally, and respectively, and for our heirs, executors, and administrators respectively, mutually given and granted, and by these presents DO, for ourselves separately, severally, and respectively, and for our respective heirs, executors, and administrators, mutually give and grant unto the within named R. G. D. R. M. and P. S. the arbitrators within named, further time for making their award of and concerning the several matters within referred to them until the 8th day of November now next ensuing, so that they, or two of them, make their award in writing, under their hands and seals respectively, ready to be delivered to the parties in difference on or before the said 8th day of November now next ensuing: and we do hereby further agree that these presents, as well as the within-written bond, and the submission thereby and hereby made of the matters in controversy, shall be made a rule of his Majesty's Court of King's Bench, &c. IN WITNESS, &c.

## AWARD *made on the foregoing* SUBMISSION.

TO ALL TO WHOM these presents shall come, We, R. G. of, &c. in the county of, &c. Esq. D. R. M. of, &c. in the county of, &c. Esq. and P. S. of, &c. Esq. SEND GREETING: WHEREAS J. H. of, &c. in the county of, &c. cooper, J. M. of, &c. in the said county of, &c. bookseller, claiming in right of his wife, J. M. late J. H. spinster; the Rev. J. S. of, &c. in the county of, &c. clerk, claiming in right of his late wife, C. S. formerly C. H. spinster, now deceased, and C. H. of, &c. aforesaid, spinster, by a certain bond or obligation, bearing date the day of in the year became bound to T. H. of, &c. in the said county of, &c. yeoman, in the penal sum of one thousand pounds, and the said T. H. by another bond or obligation, bearing even date therewith, became bound to the said J. H.—J. M. and Jane his wife, J. S. and C. H. in the like penal sum, with conditions written under the said several bonds, that they the said J. H.—J. M. and Jane his wife, J. S. and C. H. and the said T. H. respectively, should stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of us the said R. G.—D. R. M. and P. S. arbitrators, indifferently chosen, elected, and named, as well by and on the part and behalf of the said J. H. J. M. and Jane his wife, J. S. and C. H. as on the part and behalf of the said T. H. to arbitrate, award, judge, determine, and agree for, upon, touching and

concerning all and all manner of claim and claims, which they, or any, or either of them, had or pretended to have by, from, or under the several wills of T. T. long since deceased, G. H. deceased, and J. H. also deceased, respectively; AND WHEREAS by endorsement in writing on the back of each of the said several bonds, under the hands and seals of the said J. H.—J. M. and Jane his wife, J. S. and C. H. and of the said T. H. bearing date respectively the day of in the year the time for us the said arbitrators, making our award in manner aforesaid, is enlarged until the eighth day of November then next ensuing: NOW KNOW YE that we the said R. G.—D. R. M. and P. S. having taken upon ourselves the burthen of the said arbitration, and having heard, and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before us by and on behalf of the said parties in difference respectively, and having fully examined into their several alleged claims and interests under the several and respective wills of the said T. T.—G. H. and J. H. deceased, DO FIND that the said T. T. by his said will, among other specific legacies, gave and bequeathed to his nephew J. T. who is yet living, the yearly interest of two hundred pounds, at the rate of four pounds ten shillings for one hundred pounds for a year, for and during the term of his natural life, and that after the decease of the said J. T. the said testator gave and bequeathed the said principal sum of two hundred pounds, unto and amongst all and every the child and children of his said nephew J. T. that should be living at the time of the decease of the said testator, to be equally divided between them, share and share

alike, and that the said T. T. by his said will, gave, devised, and bequeathed all the rest and residue of his estate, both real and personal, subject nevertheless to the payment of his debts, legacies, and funeral expences, with which he charged, as well his real, as his personal estate, to the said G. H. his heirs, executors, and administrators, whom he appointed sole executor of his said will. AND WE the said R. G.—D. R. M. and P. S. do further find that the estate of the said T. T. which came to the hands and possession of the said G. H. deceased, was fully sufficient to satisfy and discharge all the debts and legacies and funeral expences of the said T. T. and the expences attending the execution of his said will; and that a certain freehold house, with a close of land adjoining and thereto belonging, with the appurtenances, situate, lying, and being at, &c. in the said county of, &c. now in the possession or occupation of the said C. H. was part of the estate of the said T. T. charged by him, in and by his said will, with the payment of his debts, legacies, and funeral expences as aforesaid, and remains subject to and chargeable with the bequest, hereinbefore mentioned, to the said J. T. and his children; AND FURTHER that the said T. H. as surviving executor of the will of the said G. H. is entitled to the sum of one hundred pounds, secured by mortgage on a certain freehold house, with the appurtenances, situate at, &c. aforesaid, and known by the sign of the White Lion, in the tenure or occupation of W. E. AND WE DO further find that all claim, interest, and demand, which the said J. H. Jane M. or the said J. M. in her right, and the said J. S. in right of his said late wife, or either of them,

ever had in or upon the estate or effects, or under or by virtue of the wills of the said T. T.—G. H. and J. H. or of either of them, have been fully satisfied and discharged: AND WE the said R. G.—D. R. M. and P. S. do hereby award, order, and adjudge that the said *C. H. her heirs, executors, or administrators*, shall, within one calendar month from the day of the date hereof, deliver into the hands of the said T. H. or of his certain attorney, his executors, or administrators, all deeds and other writings in her custody, possession, or power, relating to or in any way affecting the said freehold house, with the appurtenances, known by the sign of the White Lion, and *shall*, also, *within one month from the day of the date hereof, convey by good and sufficient conveyance and assurance in the law*, and deliver possession of the said freehold house and close, with the appurtenances, situate at, &c. aforesaid, and all deeds and other writings relating to or in any way affecting the same, or the title thereof, to the said T. H. or his certain attorney, or his heirs: AND WE DO further award that the said C. H. shall retain for her own use and benefit all other the effects which came or which may hereafter come to her hands or possession, as executrix of the last will and testament of the said J. H. *(save and except any rents which she may have received since the decease of the said J. H. for or on account of the said estate at, &c. aforesaid)*, in full satisfaction of all claim, interest, and demand which she has or ever had in or upon the estate and effects, or under or by virtue of the said several wills of the said T. T.—G. H. and J. H. or of either of them: AND WE DO hereby further award that the said T. H. shall, out of the said mortgage on the said house, with

the appurtenances, at, &c. called the White Lion, and out of the said freehold house and close at, &c. pay, satisfy, and discharge the bequest to the said J. T. and his children, according to the direction of the said will of the said T. T. AND WE DO further award and order that *the said C. H. shall account for and pay to the said T. H. his executors, or administrators, within one month from the date hereof, all rents which she may have received, for or on account of either of the estates at, &c. and, &c. aforesaid, since the decease of her said brother J. H.* AND WE DO also award and order that the said T. H. shall pay and refund to the said C. H. her executors, or administrators, all sum and sums of money which she may have advanced or paid the said J. T. for and on account of the interest of the said sum of two hundred pounds mentioned in the will of the said T. T. since the decease of her said brother J. H. AND WE DO likewise award, order, and direct that the said T. H. shall, within one month from the date hereof, pay or cause to be paid to the said C. H. the sum of twelve pounds twelve shillings for and in full consideration of all expences which she has been at in the repairs of the said houses at, &c. and, &c. aforesaid, or otherwise howsoever: AND WE DO further award that the said C. H. shall seal and execute to the said T. H. a release of all demands, for or on account of any claim or interest in or upon the estate and effects, or under or by virtue of the wills of the said T. T.—G. H. and J. H. or of either of them: And further that the said C. H. do and shall, within one calendar month from the date hereof, deliver unto the said T. H. his executors, or administrators, all books, accompts, discharges, releases, and writings whatsoever,

respecting only the estates of the said T. T. and G. H. deceased, or either of them, and which are now in her custody, possession, or power; and that when the said C. H. shall have fully complied with this our award, in all things hereby ordered to be done by her, then the said T. H. shall seal and execute to her a similar release; and that the said J. H. and J. M. in right of his said wife, and the said J. S. in right of his said late wife, shall seal and execute similar releases to the said T. H. and C. H. AND WE DO also award and order that the said T. H. do and shall execute to the said C. H. a bond in the penal sum of eight hundred pounds, under a condition to indemnify her the said C. H. against all demands of the said J. T. and his children who were living at the time of the decease of the said T. T. or any person or persons claiming through them, and also against all and every other person or persons whomsoever claiming under the will and wills of the said T. T. and G. H. deceased, or either of them: AND LASTLY, we do hereby award and order that the said T. H. shall pay or cause to be paid all charges and expences attending the present arbitration. IN WITNESS whereof we the said R. G. D R. M. and P. S. have hereunto set our hands and seals respectively, the day of in the year of our Lord

(Signed) R. G. L. S.
D. R. M. L. S.
P. S. L. S.

Signed, sealed, and delivered, (being first duly stamped) in the presence of
(Signed) R. R. *Not. Pub.*

BOND *from* J. S. *to* R. S. *in the Penal Sum of* 1000*l.*

THE CONDITION of this obligation is such that if the above bounden J. S. his heirs, executors, and administrators, for and on his and their parts and behalves, do in all things well and truly stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, final end, and determination of E. H. of, &c. in the county of, &c. gentleman, and W. A. of, &c. in the said county, gentleman, arbitrators, indifferently named, elected, and chosen, as well on the part and behalf of the above-bounden J. S. as of the above-named R. S. to arbitrate, award, judge, and determine, of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, deeds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending, by or between the said parties, or either of them, so as the same award be made in writing, under the hands and seals of the said arbitrators, on or before the day of next ensuing: But if the said arbitrators do not make such their award of and concerning the premises by the time aforesaid, then, if the said J. S. his heirs, executors, and administrators, for and on his and their parts and behalves, do in all things well and truly stand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination of such person as the said arbitrators shall appoint as an

umpire between the said parties of and concerning the premises, so as the said umpire do make his award or umpirage, of and concerning the premises, on or before the day of next ensuing, then this obligation to be void, or else to remain in full force: And the said J. S. doth consent and agree that his submission to the award or umpirage above mentioned shall and may be made a rule of his Majesty's Court of King's Bench, at Westminster. And it is hereby further agreed, that the said parties and their witnesses shall be examined upon oath before the said arbitrators and umpire, being first duly sworn for that purpose before the Lord Chief Justice, or one of the other Judges of his Majesty's Court of King's Bench, at Westminster: And that nothing herein contained shall extend, or be construed to extend, to dissolve an injunction obtained by the said J. S. in his Majesty's Court of Chancery, restraining the said R. S. from proceeding at law against the said J. S. touching the matters in the said injunction mentioned or referred to; but the said arbitrators or umpire are to be at liberty to order the said injunction to be dissolved if they think proper.

J. S. L. S.

Sealed and delivered (being first duly stamped) in the presence of

H. R.

WE the above named E. H. and W. A. do appoint, and the above named J. S. and R. S. do hereby consent, that S. K. of, &c. Esq. Barrister at Law, shall be

the umpire between the said arbitrators. Witness our hands this day of one thousand seven hundred and

W. H.
E. H.
J. S.
R. S.

Witness,
J. H.

## *The* AWARD.

TO ALL TO WHOM these presents shall come, I, S. K. barrister at law, of, &c. Esq. send greeting: WHEREAS J. S. late of, &c. in the parish of, &c. in the county of, &c. but now of, &c. in the said county, Gentleman, being possessed of a certain farm situate in the neighbourhood of, &c. in the county of, &c. by virtue of a certain indenture of lease thereof to him granted by A. R. Esq. for a certain term of years therein mentioned, and being indebted to R. S. of, &c. in the said county of, &c. mercer, did, by a certain indenture of mortgage, bearing date the day of in the year and made between the said J. S. of the one part, and the said R. S. of the other part, convey to the said R. S. the said indenture of lease, and the premises thereby demised, to secure to the said R. S. the payment of the sum of five hundred pounds, with lawful interest, from the day of the date of the said indenture of mortgage; in which said indenture of mortgage is contained a proviso for redemption of the said indenture of lease, and the premises thereby demised, on the payment by the said J. S. his executors, administrators, or assigns, to the

said R. S. his executors, administrators, or assigns, with interest therein as aforesaid, on the day of in the year AND WHEREAS neither the said sum of five hundred pounds, nor any part thereof, nor any interest thereon, was paid on the said day of whereby the said mortgage became absolute at law; and the said R. S. took possession of the said farm on or about the day of in the year and hath ever since continued in possession thereof, and in receipt of the profits and proceeds thereof: AND WHEREAS various other transactions and matters of account have for several years past taken place between the said parties and the said J. S. hath lately filed a bill in the High Court of Chancery against the said R. S. and divers disputes, animosities, and contentions, have taken place between the said parties; for the appeasing, pacifying, ordering, and determining whereof, the said R. S. and J. S. have submitted themselves, and are become bound each to the other by their several obligations, bearing date the day of in the year of the reign of our Sovereign Lord George the Third, by the grace of God of Great-Britain, France, and Ireland, King, Defender of the Faith, and in the year of our Lord in the penal sum of one thousand pounds of good and lawful money of Great-Britain, with conditions thereunder written, to stand to, obey, abide by, perform, fulfil, and keep the award of W. A. of in the county of gentleman, and E. H. of in the said county, gentleman, arbitrators, indifferently chosen, as well on the part and behalf of the said R. S. as of the said J. S. to arbitrate, award, order, judge, and determine of and concerning

all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time or times theretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by or between the said parties, or either of them, so as the same award were made in writing, under the hands and seals of them the said W. A. and E. H. on or before the day of then next ensuing: but if they the said W. A. and E. H. should not make such their award on or before the said day of then that they the said parties should stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end, and determination, of such person as the said arbitrators should appoint as an umpire between the said parties, of and concerning the premises, so as the said umpire should make his award or umpirage, of and concerning the premises, on or before the day of then next ensuing: AND WHEREAS the said W. A. and E. H. did, by a note in writing, under their hands, bearing date the day of written under the condition annexed to the said bonds, appoint me the said S. K. to be the umpire between them: AND WHEREAS the said W. A. and E. H. did not make any award of and concerning the premises on or before the said day of NOW KNOW YE, that I the said S. K. appointed umpire as aforesaid, having taken upon myself the charge of the said umpirage; and having deliberately, and at large, heard, examined, and considered the allegations, witnesses, and evidences of

both the said parties concerning the premises, DO thereupon make this my umpirage and final determination, in writing, between the said parties, of and concerning the premises, in manner and form following, that is to say, that all proceedings on the said Bill in Chancery shall cease and be from hereforth considered as null and void, and of no effect, as if the said Bill had been dismissed by an order of the said Court: and I do hereby adjudge, that, after giving the said J. S. credit for the produce of the crop of hay and beans now remaining undisposed of on the said farm, and for the value of the after-grass up to the day of last, there remained due to the said R. S. from the said J. S. on the said day of on the said mortgage, the sum of two hundred and seventy-two pounds sixteen shillings and sixpence, exclusively of the two several sums of one hundred and three pounds twelve shillings and sixpence for the rent of the said farm, and thirteen pounds four shillings for tithes, both due on the day of last, but which were not paid by the said R. S. on or before the said day of the said month: And I do hereby further adjudge, that the said J. S. was on the said day of further indebted to the said R. S. in the sum of seven hundred and sixteen pounds fifteen shillings and eight-pence, on a general account, independently of the said mortgage, and exclusively of the sum of one hundred and twenty-seven pounds, being the estimated value of the several articles mentioned in a certain inventory, signed by the said R. S. and now in the possession of the said J. S. which several articles were left by the said J. S. on the said farm when he quitted the possession thereof, for

which I have given the said J. S. credit in taking the said general account, and also exclusively of the sum of one hundred and seven pounds, being the estimated value of a large quantity of dung now lying on the said farm, but not spread thereon, and for which I have not given the said R. S. credit in stating the account between the said parties, relative either to the said mortgage or to the said general account: And I do hereby award that the said R. S. shall forthwith cause the said quantity of dung to be spread on the said farm; and if the said J. S. shall, on the day of now next ensuing the date of these presents, or at any time before that day, pay to the said R. S. such sum of money as, on a fair account to be taken between them, shall appear to be due to the said R. S. on the said mortgage, and shall either pay to the said R. S. the said sums of one hundred and twenty-seven pounds and one hundred and seven pounds, with interest on the latter sum from the said day of or shall jointly, with two responsible persons, to be approved of as hereafter mentioned, enter into a bond to the said R. S. in the penal sum of four hundred and sixty-eight pounds, with a condition to be void on the payment of the said several sums of one hundred and twenty-seven pounds and one hundred and seven pounds to the said R. S. within six calendar months from the day of the date of such bond, together with interest on the said sum of one hundred and seven pounds from the said day of And shall also jointly, with the said two responsible persons, execute a warrant of attorney to the said R. S. of even date with the said bond, authorizing him to enter up judgment against them in his Majesty's Court of King's Bench for the said sum

of four hundred and sixty-eight pounds, with a defeasance annexed to the said warrant of attorney that it shall be void on payment to the said R. S. of the said sums of one hundred and twenty-seven pounds and one hundred and seven pounds, with interest on the latter sum as aforesaid, within six calendar months from the day of the date thereof, then he the said R. S. shall deliver up to the said J. S. the possession of the said farm, and the several articles specified in the inventory hereinbefore mentioned: And I do hereby further award and direct, that on the one side of the said account shall be stated as well the said sum of two hundred and seventy two pounds sixteen shillings and sixpence, together with interest thereon from the said day of to the day of the taking the said account, as all rent, tithes, taxes, and other reasonable and proper charges and expences, including the expences of spreading the said dung on the said farm, paid, disbursed, and incurred by the said R. S. on account of the said farm; and on the other side of the said account shall be stated the profits and proceeds of the said farm, received or enjoyed by the said R. S. from the said day of to the day of settling the said account; but the said J. S. shall not in any shape be charged with the expences of carrying the produce of the said crop now remaining on the said farm undisposed of, nor shall he be charged with any expences accrued on account of the garden and orchard adjoining to the house, on the said farm, nor have any credit given him on account of the produce of the said garden and orchard, but shall be allowed in the said account at the rate of fifteen pounds by the year, in the name of rent, for the said house, garden,

and orchard, from the said day of to the time of settling the said account, PROVIDED that the said two persons to be offered by the said J. S. as securities for the payment of the said sum of two hundred and thirty-four pounds, be approved by the said W. A. and E. H. or in case they shall not agree in the course of one week from the time when the names of the said persons proposed as securities shall be given in by the said J. S. to the said R. S. then to be approved by me the said S. K. AND PROVIDED ALSO that the said J. S. shall give to the said R. S. six weeks notice in writing of his intention to redeem the said mortgage, together with the names of the two persons he shall propose as security for the payment of the said several sums of one hundred and twenty-seven pounds and one hundred and seven pounds, with interest on the latter sum as aforesaid, if he shall propose to give such security instead of paying the said sums: AND I DO hereby further award and determine, that if the said J. S. shall not in manner aforesaid redeem the said mortgaged premises on or before the said day of now next ensuing, then he shall be for ever foreclosed of all equity of redemption thereof: AND the said R. S. shall become absolute owner of the said farm, and of the said indenture of lease, and of the said several articles contained in the inventory hereinbefore mentioned, fully, freely, and clearly discharged of all claim or demand of the said J. S. and of all and every persons and person claiming by or through him, or in his right, and that in such case the said R. S. shall take the said farm and indenture of lease, in full satisfaction for the said sum of five hundred pounds secured by the said mortgage, and all interest thereon, and

shall take the said several articles contained in the said inventory as a full and complete satisfaction and discharge to the said J. S. for the said sum of one hundred and twenty-seven pounds, for which I have given him credit as aforesaid in the said general account: AND I DO hereby further order and award, that the said J. S. shall, within two days after the date of these presents, notice thereof being immediately given to him, execute to the said R. S. a warrant of attorney authorizing the said R. S. to enter up judgment against him for the sum of one thousand four hundred and thirty-three pounds eleven shillings and four pence, being the amount of the double of the said sum of seven hundred and sixteen pounds fifteen shillings and eight-pence, with a defeasance thereto annexed, that if the said J. S. shall pay to the said R. S. the sum of one hundred pounds on or before the day of in the year and the sum of fifty pounds every six months afterwards, that is to say, on the day of in the year on the day of in the said year, and so on till the whole sum of seven hundred and sixteen pounds fifteen shillings and eight pence shall be discharged, then the said warrant of attorney shall be void, but that the said R. S. shall be at liberty to sue out execution on the said judgment for the whole sum of seven hundred and sixteen pounds fifteen shillings and eight pence, on default of any one payment as aforesaid, or for so much of the said sum as shall remain due and unpaid when such default shall be made: AND I DO hereby further award, that the said R. S. shall pay the sum of ten pounds towards the discharge of the bill of G. S. for expences incurred in the course of this arbitration, at

his house called the Old Swan, in, &c. and that the said J. S. shall pay to the said G. S. the remainder of his said bill: AND I DO hereby finally order and award that the said R. S. shall forthwith execute to the said J. S. a general release of all actions, cause and causes of actions, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world until the day of the date of the said bonds of arbitration, save and except the said warrant of attorney herein before awarded, to be executed by the said J. S. to the said R. S. and that the said J. S. shall forthwith execute to the said R. S. a similar release, with the exception only of his right to redeem the said mortgaged premises on the terms and in the manner hereinbefore directed and appointed: IN WITNESS whereof, I, the said S. K. to both parts of this present award indented, have set my hand and seal, this day of one thousand seven hundred and

S. K. L. S.

Signed, sealed, and delivered, (being first duly stamped) in the presence of

R. W. H.

*The* RELEASES *given by each of the* PARTIES *in obedience to the* AWARD.

KNOW ALL MEN by these presents, that I, R. S. of, &c. in the county of, &c. mercer, have remised, released, and for ever quit claimed; and by these presents do remise, release, and for ever quit claim, unto J. S. of, &c. in the said county, gentleman, his heirs, executors, and administrators, all actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the day of last, save and except a certain warrant of attorney, directed to be executed to me by the said J. S. in and by a certain award made this day of in the year by S. K. Barrister at Law, of, &c. Esq. on a reference to him of all disputes between me and the said J. S.

KNOW ALL MEN by these presents, that I, J. S. of, &c. in the county of, &c. gentleman, have remised, released, and for ever quit claimed; and by these presents do remise, release, and for ever quit claim, unto R. S. of, &c. in the said county, mercer, his heirs, executors, and administrators, all actions, cause and causes of action, judgments, suits, controversies, trespasses, debts, duties, damages, accounts, reckonings, and demands whatsoever, for or by reason of any matter, cause, or thing whatsoever from the beginning of

the world to the day of last, save and except my right to redeem a certain farm now in mortgage to the said R. S. at the time, under the terms and in the manner prescribed in and by a certain award made the day of in the year by S. K. Barrister at Law, of, &c. Esq. on a reference to him of all disputes between me and the said R. S.— In Witness

---

## Submission *by* Indenture.

THIS INDENTURE TRIPARTITE made, &c. between E. G. of, &c. and J. A. of, &c. executors of the last will and testament of P. M. late of, &c. deceased, of the first part; P. M. G. one of the grandchildren of the said P. M. deceased, by his daughter, late the wife of the said E. G. now also deceased, of the second part; the said P. M. G. the said J. A. husband of E. A. the only surviving daughter of the said P. M. deceased, J. B. the younger, of, &c. husband of L. G. granddaughter of the said P. M. deceased, E. G. the younger, of, &c. Jos. G. of, &c. John G. of, &c. P. A. of, &c. and S. A. of, &c. all grandchildren of the said P. M. deceased, of the third part:—

Whereas some differences and disputes have arisen and are still depending between the said E. G. the elder, and J. A. as executors aforesaid, and the said P. M. G. and also between the said executors, and the said J. A. in right of his wife the said E. A. the said

P. M. G. the said J. B. the younger, the said E. G. the younger, the said Jos. G. the said John G. the said P. A. and S. A. in their respective rights and qualities above mentioned, touching the estate and effects of the said P. M. deceased, and in order to put an end to the said differences and disputes, and to obtain an amicable adjustment thereof, The said parties HAVE, and each and every of them HATH, agreed to refer the same to the award, order, arbitrament, and final determination of R. W. of, &c. N. A. of, &c. and Ed. G. of, &c. or any two of them, arbitrators indifferently elected and named to arbitrate, award, order, judge, and determine of and concerning the said differences and disputes, between the said parties respectively: NOW THIS INDENTURE witnesseth, that they the said E. G. the elder, and J. A. as executors as aforesaid, and the said P. M. G.—J. B. the younger, E. G. the younger, Jos. G.—John G.—P. A. and S. A. DO, and each and every of them DOTH, each for himself and herself severally and respectively, and for his and her several and respective heirs, executors, and administrators, covenant, promise, and agree to and with each other, his and her heirs, executors, and administrators respectively, well and truly to stand to, obey, abide by, observe, perform, fulfil, and keep the award, order, arbitrament, and final determination of the said R. W. N. A. and Ed. G. or any two of them, arbitrators, indifferently elected and named by and on behalf of the said parties respectively, to arbitrate, award, order, judge, and determine of and concerning [all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, promises, accounts, reckonings, sums of money,

judgments, executions, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, both in law and equity at any time heretofore, had, made, moved, brought, commenced, sued, prosecuted, committed, or depending by or between the said parties, or any of them, touching][1] the premises, or any thing in any wise relating thereto, so as the said award of the said arbitrators, or that of any two of them be made in writing under their hands, or under the hands of any two of them. And it is also agreed by and between the said parties, that these presents, and the submission hereby made of the said matters in controversy, shall be made a rule of his Majesty's Court of King's Bench at Westminster, to the end that the said parties respectively may be finally concluded by the said arbitration, pursuant to the statute in that case made and provided; and the said parties do hereby further agree that none of them shall or will prosecute any action or suit in any court of law or equity against the said arbitrators, any or either of them, or bring or prefer any bill in equity against each other, of and concerning the premises until the said award be made and delivered, also that all costs and charges attending the present arbitration shall be in the discretion of the said arbitrators or any two of them, and paid and satisfied pursuant to their award, and to the full performance of the premises, the said parties bind themselves severally and respectively, their several and respective heirs, executors, and administrators, each to the other of them respec-

[1] All between the brackets is not only unnecessary, but seems improper.

tively, in the penal sum of 5000*l.* of good and lawful money of Great Britain, firmly by these presents: IN WITNESS whereof, they have hereunto set their hands and seals respectively, the day and year first above written.

Signed, sealed, and delivered (being first duly stamped) in the presence of

AWARD *made by the three* ARBITRATORS *on the above* SUBMISSION.

TO ALL to whom these presents shall come, We, R. W. of, &c. N. A. of, &c. and Ed. G. of, &c. send greeting: WHEREAS in and by a certain Indenture tripartite, bearing date, &c. and made between, &c. [reciting nearly the whole of the indenture] as by the said indenture relation being thereunto had, may more fully and at large appear; NOW KNOW YE that we the said R. W.—N. A. and Ed. G. having taken upon ourselves the charge of the said award, and having heard, and duly and maturely weighed and considered the several allegations, vouchers, and proofs brought before us, by and on behalf of the said parties respectively, are of opinion that the intention of the said P. M. deceased, was by his last will and testament to dispose of, give, devise, and bequeath the following legacies and property, namely, unto his widow E. M. the interests or dividends arising from 4000*l.* three per cent. consolidated Bank annuities, and the use of the household furniture, plate, and utensils in and appertaining to the testator's house at Plaistow, &c. wherein

he died, his chariot, a horse, and cow, (valued together at 642*l.* 1*s.* 1*d.*) during her natural life, and from and after her decease, the said annuities,[1] household furniture, plate, and utensils, to be the property of, and divided amongst his seven grand-children, the above named P. M. G. &c. by even and equal portions; unto the said P. M. G. all his the testator's interest or concern in shipping, and the benefit to arise therefrom, share and share alike to the said P. M. G. &c. to the said P. M. G. the house then occupied by his father the said E. G. the elder; to the said L. B. the house then occupied by Mrs. F. and to the said E. G. the younger the house then occupied by Mr. G. all which houses are situate in or near Broad-street, in the said parish of St. George in the East; unto the said seven grand-children the following specific legacies or sums of money, that is to say, to the said P. M. G. and L. B. the sum of 2000*l.* each, to the said E. G. the younger, Jos. G. John G.—P. A. and S. A. 1000*l.* each, and to his daughter the said E. A. a sum of 3000*l.* also the house and land situate at Plaistow aforesaid, then and now in the occupation of the said J. A. together with his coach and horses: THEREFORE WE DO hereby appreciate and fix the aforesaid devises, legacies, and bequests, made, given, and bequeathed, or intended to be made, given, and bequeathed to the said E. M.—P. M. G.—L. B.—F. G. the younger, Jos. G. John G. P. A.— S. A. and E. A. respectively, in and by the last will and testament of the said P. M. deceased, in

[1] In *fact* the testator had made no disposition of the principal after his widow's decease.

manner above mentioned: AND WE DO award and confirm the same to the said devisees and legatees, their HEIRS and ASSIGNS respectively; and we do order and direct the said several devisees and legatees, and all and every persons or person claiming or to claim for, by, or from or under them or any of them, to be and remain fully satisfied and contented with the sums and proportions of the estate, goods, chattels, and credits of the said P. M. deceased, here above specified so far as relates thereto, or to any part thereof. AND WE DO order and direct that the said E. G. the elder, and J. A. as executors as aforesaid, do and shall well and truly pay, or cause to be paid, unto the said P. M. G. at, &c. on, &c. between the hours, &c. the sum of 1690*l.* in full of all claims and demands the said P. M. G. or his representatives, can or may have on the estate of the said P. M. deceased, for balance of account due to him as partner with the said late P. M. at the time of his decease; AND WE DO direct the said P. M. G. to receive the said sum accordingly: AND WE DO hereby further award and order that one moiety of the book debts due and owing to the said P. M. deceased, and the said P. M. G. as partners in trade, and which have been taken by the said P. M. G. at and for the sum of 1375*l.* shall be the property of the said P. M. G. that the remaining moiety thereof shall be the property of and divided among the said seven grand-children of the said P. M. deceased. WE DO also award unto the said E. A. all the household furniture and utensils that were in the house now occupied by the said J. A. at the decease of the said late P. M. together with every article then in, upon, or in any wise belonging or appertaining to the said house

and premises: AND WE DO moreover award and order that all the rest, residue, and remainder of the estate, goods, chattels, and credits of the said P. M. deceased, shall be the property of and divided among his said seven grand-children, the said P. M. G.—L. B. E. G. the younger, Jos. G. John G.—P. A. and S. A. by even and equal portions; AND WE DO likewise award, order, and direct, that the said E. G. the elder, and J. A. as executors as aforesaid, do and shall well and truly pay, or cause to be paid, unto the said P. M. G. one moiety of the said book debts, and to each of them the said P. M. G.—J. B. the younger, in right of his wife the said L. B.—E. G. the younger, Jos. G.—John G.—P. A. and S. A. an equal portion of the other moiety of the said book debts, also their respective proportion, or such part thereof as has not been already paid of the interest or concern in shipping of the said P. M. deceased, pursuant to an agreement entered into between the said E. G. the elder, and J. A. as executors as aforesaid, and the said P. M. G. amounting as per said agreement to 1575*l.* and which agreement WE DO direct shall be finally confirmed, as also of such other part of the said shipping, or interest therein of the said deceased, as has not been included in the said agreement, and likewise of the rest, residue, and remainder of his estate, goods, chattels, and credits not otherwise disposed of, in, or by his last will or testament, as the same shall be from time to time collected, gotten in, and received by the said executors to the amount of 140*l.* or upwards: AND WE DO direct the said devisees and legatees respectively, and every other person claiming or to claim by, from, or under them, or any of them, from time to time, when law-

fully required to sign, seal, execute, and deliver good and sufficient releases, acquittances, and discharges for all monies paid, or to be paid, to them by the said executors, by virtue of the aforesaid will, and of these presents; AND WE DO moreover award that the said E. G. the elder, and J. A. as executors as aforesaid, do and shall pay into the hands of ——— and ——— public notaries, the sum of 12*l.* 12*s.* at or before the delivery of this our award, for charges of the present reference; and upon performance of this our award, all differences and disputes in any wise subsisting by and between the said parties, or any of them, previous to the day of the date of the said recited indenture, touching the premises, shall utterly cease and determine. IN WITNESS, &c.[1]

---

RULE *of* REFERENCE *at* NISI PRIUS, *where a* JUROR *is withdrawn.*

LONDON } At the sitting of Nisi Prius held at
TO WIT. } Guildhall, in and for the city of London, on, &c. and in the year of the reign of our Sovereign Lord George the Third, now King of Great-Britain, &c. before the Right Honorable Lloyd Lord Kenyon, Chief Justice of our Lord the King, assigned to hold the Pleas before the King himself.

[1] This is the award referred to in p. 351—354.

HORTON v. BOLT. } IT is ordered by the Court, by and with the consent of the plaintiff and defendant, their counsel, and attornies, that the last juryman sworn and impanneled in this cause, be withdrawn out of the pannel, and that all matters in difference between the said parties in this cause be referred to the award, order, arbitrament, final end, and determination of F. C. of the Middle Temple, Esq. so as he shall make and publish his award in writing of and concerning the premises in question, on or before the day of Hilary Term now next ensuing; and that the said parties shall and do perform, fulfil, and keep such award, so to be made by him the said arbitrator as aforesaid: And it is also ordered, by and with such consent as aforesaid, that the costs of the said cause shall abide the event and determination of the said award, and that the costs of the said reference shall be in the discretion of the said arbitrator, who shall direct and award by whom, and to whom, and in what manner the same shall be paid: And it is likewise ordered, by and with such consent as aforesaid, that the plaintiff and defendant respectively are to be examined upon oath, to be sworn before the said Lord Chief Justice, or some other Justice of the same Court of our Lord the King before the King himself, if thought necessary by the said arbitrator, and do produce before the said arbitrator all books, papers, and writings touching and relating to the matters in difference between the said parties, as the said arbitrator shall think fit, and that the witnesses of the plaintiff and defendant respectively are to be examined upon oath, to be sworn before the said Lord Chief Justice, or some other Justice of the same Court: And it is likewise ordered, by and

with such consent as aforesaid, that neither the plaintiff nor defendant shall prosecute, or bring any action or suit in any court of law or equity against the said arbitrator, or bring or prefer any bill in equity against each other, of and concerning the premises in question so as aforesaid referred: And it is further ordered, by and with such consent as aforesaid, that if either party shall, by affected delay or otherwise, wilfully prevent the said arbitrator from making an award, he shall pay such costs to the other as the said Court of our said Lord the King, before the King himself, shall think reasonable and just: And lastly, it is ordered by the like consent as aforesaid, that the said Court of our said Lord the King, before the King himself, may be prayed that this order may be made a rule of the same court.

By the Court.

T. L.

---

RULE *of* REFERENCE *at* NISI PRIUS, *where a* VERDICT *is taken for the* PLAINTIFF.

LONDON } AT the sitting of Nisi Prius held at
TO WIT. } Guildhall, in and for the city of London, on, &c. in the year of our Lord and in the year of the reign of our Sovereign Lord George the Third, now King of Great-Britain, &c. before the Right Honorable Lloyd Lord Kenyon, Chief Justice of our Lord the King, assigned to hold Pleas before the King himself.

M——— } IT is ordered by the Court, by and with
*v.* } the consent of the plaintiff and defendant,
L——— } their counsel, and attornies, that the jury find a verdict for the plaintiff damages and costs subject to this order and the award to be made pursuant thereto; and that all matters in difference between the said parties be referred to the award, order, arbitrament, final end, and determination of T. C. of, &c. in the county of, &c. Esq. so as he shall make and publish his award in writing of and concerning the premises in question, on or before the day of Trinity Term now next ensuing; and that the said parties shall and do perform, fulfil, and keep such award, so to be made by him the said arbitrator as aforesaid: And it is also ordered, by and with such consent as aforesaid, that the costs of the said cause shall abide the event and determination of the said award, and that the costs of the reference shall be in the discretion of the said arbitrator, who shall direct and award by whom, and to whom, and in what manner the same shall be paid: And it is likewise ordered, by and with such consent as aforesaid, that the plaintiff and defendant respectively are to be examined upon oath, to be sworn before the said Lord Chief Justice, or some other Justice of the same Court of our Lord the King before the King himself, if thought necessary by the said arbitrator, and do produce before the said arbitrator all books, papers, and writings touching and relating to the matters in difference between the said parties, as the said arbitrator shall think fit, and that the witnesses of the plaintiff and defendant respectively are to be examined upon oath, to be sworn before the said Lord Chief Justice, or some other Justice

of the same Court: And it is likewise ordered, by and with such consent as aforesaid, that the defendant shall not bring any writ of error to reverse the said judgment, and that neither the plaintiff nor the defendant shall prosecute, or bring any action or suit in any court of law or equity against the said arbitrator, or bring or prefer any bill in equity against each other, of and concerning the premises in question so as aforesaid referred: And it is further ordered, by and with such consent as aforesaid, that if either party shall, by affected delay or otherwise, wilfully prevent the said arbitrator from making an award, he shall pay such costs to the other as the said Court of our said Lord the King, before the King himself, shall think reasonable and just: And lastly, it is ordered, by the like consent as aforesaid, that the said Court of our said Lord the King, before the King himself, may be prayed that this order may be made a rule of the same court.

By the Court.

T. L.

---

## Special Reference *by* Rule *of* Court.

WEDNESDAY next after fifteen days of the Holy Trinity, in the 38th year of King Geo. the 3d.

C. *v.* E. } UPON hearing Mr. P. of counsel for the plaintiff, and Mr. E. of counsel for the defendant, and by their consent IT IS ORDERED, that the plaintiff be at liberty forthwith to enter up

judgment for the damages mentioned in the declaration in this cause and costs of suit, such judgment to be subject to the award hereinafter mentioned, and that all matters in dispute between the plaintiff and defendant shall be referred to the final award of S. K. of, &c. and I. E. of, &c. barristers at law, so that their award be made in writing, and *ready to be delivered to the party requiring the same*, on or before the first day of next, and in case the said S. K. and I. E. shall not then be prepared to make and publish their said award, or cannot agree touching the matters hereby to them referred, then that the same shall be referred to such third person as the said S. K. and I. E. shall mutually agree upon and nominate, whose name shall be indorsed hereon, before the said arbitrators shall proceed on the said arbitration, so that the said last mentioned award or umpirage be made in writing, and ready to be delivered to such of the parties as require the same, on or before the first day of next: And in case the said arbitrators or umpire shall not be prepared to make and publish their award or umpirage at the respective times aforesaid, then the said parties shall from time to time consent to such enlargement of the time for the making and publishing the said award or umpirage as this Court or any of the Judges thereof shall deem reasonable; and that the costs of this action, and also the costs of a certain action brought by the defendant against the plaintiff in the Court of Common Pleas, and also the costs of the reference and the award to be made in pursuance thereof, shall abide the event and determination of the said award: And that neither the plaintiff nor defendant shall be examined before the said arbitrators or umpire, but that they shall produce

before the said arbitrators or umpire all books, papers, and writings in their respective custody or power, relating to the said matters in difference, as the said arbitrators or umpire shall direct; and that the witnesses of the plaintiff and defendant respectively, (if required by the said arbitrators or umpire), shall be examined upon oath to be sworn in open Court, or before some Judge of this Court; and that neither the plaintiff nor defendant shall bring or further prosecute any action or suit in any court of law or equity against the said arbitrators or umpire, or against each other, or bring or prefer any bill in equity against each other, of and concerning the premises in question so as aforesaid referred: And in case either party shall neglect or refuse to attend the said arbitrators or umpire, the said arbitrators or umpire shall be at liberty to proceed in the said arbitration, and make their or his award ex parte.

By the Court.

We appoint
the day of
at o'clock precisely,
at

I. E.
S. K.

AWARD *made on the foregoing* SUBMISSION.

TO ALL TO WHOM these presents shall come, I. E. of, &c. in the county of, &c. Esq. and S. K. of, &c. Esq. barristers at law, SEND GREETING:— WHEREAS divers suits, disputes, controversies, and differences having arisen and being depending between B. C. late fourth mate of the Melville Castle Indiaman, and W. E. late third mate of the same ship, of and concerning divers sums of money claimed by the said B. C. to be due to him from the said W. E. and also of and concerning divers other sums of money claimed by the said W. E. to be due to him from the said B. C. AND WHEREAS the said B. C. for the recovery of the said sums of money claimed by him to be due from the said W. E. had commenced an action against the said W. E. in his Majesty's Court of King's Bench; and the said W. E. for the recovery of the said sums of money claimed by him to be due from the said B. C. had commenced an action against the said B. C. in his Majesty's Court of Common Pleas; and the said two actions respectively, at the time of making the rule or order of his Majesty's Court of King's Bench next hereinafter mentioned, were depending and undetermined: AND WHEREAS by a rule or order of his Majesty's Court of King's Bench made in the said action, in which the said B. C. was the plaintiff, and the said W. E. was the defendant as aforesaid, on next after fifteen days of the Holy Trinity, in the year of King George the Third, It was ordered (among other things) that the said B. C. should

be at liberty forthwith to enter up judgment for the damages mentioned in the declaration in the said cause then depending in the said Court of King's Bench, and costs of suit, subject to the award in the said order mentioned; and that all matters in dispute between the parties in the said last-mentioned cause should be referred to the award of us the said I. E. and S. K. so that our award should be made in writing, and ready to be delivered to the party requiring the same on or before the day of next, after the date of the said order or rule of court; and that the costs of the said last-mentioned action, and also the costs of the said action brought by the said W. E. against the said B. C. in the Court of Common Pleas, and also the costs of the reference and of the award to be made in pursuance thereof, should abide the event and determination of the said award: NOW KNOW YE that we the said I. E. and S. K. having, in pursuance of the said rule or order, taken upon ourselves the burthen of the said arbitration, and having heard and read all the evidence adduced and brought before us for and on the parts and behalf of the said B. C. and W. E. respectively touching the matters in difference between them as aforesaid, and having duly weighed and maturely considered the same, do make and publish our award of and concerning the premises in manner following: THAT IS TO SAY, we the said I. E. and S. K. do find that the said B. C. is indebted to the said W. E. in the sum of of lawful money of Great-Britain; and we do hereby award and order, that the said B. C. shall pay to the said W. E. the said sum of upon demand thereof; and we do further award, order, and determine, that the said

B. C. shall execute to the said W. E. a general release of all matters in difference between them up to the date of the said order or rule of court, and that the said W. E. shall, on payment of the said sum of and of the costs of the said two actions so depending as aforesaid, and also the costs of the reference and of this our award, as directed by the said rule or order, execute to the said B. C. a like release upon demand thereof being respectively made. IN WITNESS whereof, we the said I. E. and S. K. have hereunto set and subscribed our names to this our award this day of in the year of our Lord one thousand seven hundred and

I. E.
S. K.

Signed and published as their award by the above-named I. E. and S. K. in the presence of

R. E.

# PLEADINGS ON AWARDS.

## INDEBITATUS ASSUMPSIT *on an* AWARD *for the* PAYMENT *of* MONEY.

LONDON } A. B. complains of C. D. being, &c.
TO WIT. } FOR THAT WHEREAS on, &c. at, &c. divers disputes, differences, and controversies had arisen, and were depending, between the said A. B. and the said C. D. and thereupon for putting an end to the said disputes, differences, and controversies, the said A. B. and the said C. D. on the same day and year aforesaid, at, &c. agreed to submit, and did submit, themselves to stand to the award, order, and final determination of E. F. of, &c. and G. H. of, &c. arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said A. B. as of the said C. D. to award, order, and determine of and concerning the said disputes, differences, and controversies:[1] AND WHEREAS afterwards, to wit, on, &c. the said E. F. and G. H. in due manner made their award, order, and determination, of and concerning the

[1] This form is on the supposition that no time is limited in the Submission for making the Award; but if there be a proviso, limiting the time, it must be recited; and in the subsequent part it must be shewn that the award was made within that time.

premises,[2] whereby the said E. F. and G. H. amongst other things, awarded and ordered that the said C. D. his heirs, executors, or administrators, should, on or before, &c. then next ensuing, well and truly pay, or cause to be paid, to the said A. B. his executors, administrators, or assigns, the sum of one hundred and twenty pounds, and that thereupon the said A. B. should execute to the said C. D. a general release of all actions, suits, damages, accounts, reckonings and demands whatsoever, from the beginning of the world to the day of the said submission; and that the said C. D. should then execute to the said A. B. a like general release: of all which said premises he the said C. D. afterwards, to wit, on, &c. at, &c. aforesaid had notice, by reason whereof, he the said C. D. became liable to pay to the said A. B. the said sum of one hundred and twenty pounds, in the said award mentioned; and being so liable, he the said C. D. in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, &c. aforesaid, undertook and faithfully promised the said A. B. to pay him the said sum of money when he the said A. B. should be thereto afterwards requested: nevertheless the said C. D. not regarding, &c. to the damage of the said A. B. of two hundred pounds.

[2] This is on the supposition that there is no proviso that the award should be made in writing; but if such proviso be in the submission, then it must be recited in the former part of the declaration, and here the award must be recited to have been made in writing: If no such proviso be in the submission, then, whether the submission or the award, or both, be in writing or not, it is not necessary to shew that the award was in writing, unless, perhaps, where the latter is under hand and seal.

## ASSUMPSIT *on* MUTUAL PROMISES *to* PERFORM *an* AWARD.

MIDDLESEX } A. B. complains of C. D. being, &c.
TO WIT. } FOR THAT WHEREAS on, &c. at, &c. divers disputes, differences, and controversies had before that time arisen, and were then depending, between the said A. B. and the said C. D. and thereupon, for putting an end to the said disputes, differences, and controversies, the said A. B. and the said C. D. on the same day and year aforesaid, at, &c. aforesaid, submitted themselves, and then and there agreed to submit themselves, to stand to, abide by, observe, perform, and fulfil the order, rule, and determination of E. F. of, &c. and G. H. of, &c. indifferently chosen by the said A. B. and the said C. D. to settle all and all manner of debts, differences, quarrels, disputes, reckonings, agreements, and all other dues and demands both at law and in equity, or otherwise howsoever, then subsisting between them: And it was then and there further agreed, that the opinion, award, and determination of them the said E. F. and G. H. touching the matters in question, should be final, provided the same should be delivered in writing, and signed by them, on or before, &c.—but if they the said E. F. and G. H. should not be able to settle the aforesaid disputes and differences on or before the said, &c. then the said A. B. and the said C. D. did, by their said agreement, empower them the said E. F. and G. H. to choose and fix upon some other person, whose determination should be likewise final; and the said agreement being so made as aforesaid, afterwards, to wit, on the same, &c. in consideration that the said A. B. at the special in-

stance and request of the said C. D. had then and there undertaken and faithfully promised to perform and fulfil the before-mentioned agreement in all things on his part and behalf to be performed and fulfilled, he the said C. D. undertook, and then and there faithfully promised the said A. B. that he the said C. D. would perform the said agreement in all things therein contained on his part and behalf to be performed and fulfilled; and the said A. B. in fact says, that the said E. F. and G. H. being such arbitrators as aforesaid, could not agree in opinion so as to settle the said matters in dispute between the said A. B. and C. D. and thereupon afterwards, and before the said, &c. [the time limited for the two arbitrators to make their award] to wit, on, &c. the said E. F. and G. H. being such arbitrators as aforesaid, by virtue of the said power so given to them as aforesaid, and by and with the approbation and consent of the said A. B. and the said C. D. did nominate and appoint one J. S. to be umpire, to arbitrate, award, order, and finally determine of, in, and concerning all matters in difference between the said A. B. and C. D. as well on the part and behalf of the said A. B. as of the said C. D. so that the said J. S. should make and set down his award and umpirage in writing, ready to be delivered to the said A. B. and C. D. on or before the, &c. And the said A. B. further says, that the said J. S. being such umpire as aforesaid, and having taken on himself the charge or burthen of the said award or umpirage, did afterwards, and within the time in that behalf limited for the making of the said award or umpirage as aforesaid, to wit, on, &c. at, &c. in due manner make and set down his award or umpirage in writing of and concerning the matters in

difference at the time of making of the said agreement, so referred to him as aforesaid, then ready to be delivered to the said A. B. and the said C. D. bearing date the same day and year last aforesaid; and thereby he the said J. S. did, among other things, award, order, decree, and determine of and concerning the aforesaid matters in difference, that, &c. [here set forth so much of the award as is necessary to support the action.] Of all which premises the said C. D. afterwards, to wit, on the said, &c. at, &c. had notice; by reason of which premises the said C. D. became liable to pay, &c. to the said A. B. &c. [or became bound to do the specific thing awarded, and in which it is intended that the breach should be assigned, as the case may be,] according to the form and effect of the said award, and which he the said C. D. ought to have done, according to the form and effect of the said agreement and the said promise and undertaking of the said C. D. so made as aforesaid: Yet the said C. D. not regarding the said agreement, nor his said promise and undertaking so by him in this behalf made, but contriving, &c. hath not yet paid, &c. [or hath not yet done the thing specifically awarded, as the case may be,] although he the said C. D. was thereto requested by the said A. B. but to pay the same, &c. [or to do, &c. as the case may be] hath hitherto wholly refused, and still doth refuse, contrary to the form and effect of the said agreement, and the said promise and undertaking of the said C. D. so made as aforesaid.[3]

[3] Vid. p. 11. 277. et seq—and for more examples of declarations in assumpsit on awards, vide Wentworth's Pleader, vol. 1. p. 90—100.

## DEBT *on an* AWARD *for the* PAYMENT *of* MONEY.

LONDON } W. G. late of, &c. was summoned to
TO WIT. } answer to J. A. in a plea that he render to him 500*l.* which he owes to him and unjustly detains from him, &c. and thereupon the said J. by C. D. his attorney, says, that WHEREAS on, &c. at London aforesaid, &c. divers controversies and disputes had arisen, and were then depending, between the said J. and the said W. for the determining whereof the said J. and the said W. on the same, &c. at, &c. submitted themselves to stand to the award and determination of J. B.—J. J. and R. B. or any two of them, arbitrators indifferently named, elected, and chosen by and between the said parties to arbitrate, award, order, judge, and determine of and concerning the same controversies and disputes, so as the said arbitrators, or any two of them, should make and publish their award in writing of and concerning the premises so referred as aforesaid, on or before, &c. and the said J. in fact, says, that the said J. B.—J. J. and R. B. the said arbitrators, having taken upon themselves the burthen of the said arbitration, they the said J. B.—J. J. and R. B. afterwards, and within the time above limited for making the said award, to wit, on, &c. at, &c. aforesaid, &c. made their award of and concerning the premises so referred to them as aforesaid, in writing under their hands and seals, ready to be delivered to the said parties, or either of them who should desire the same, bearing date the same day and year last aforesaid; and by the said award they the said J. B.—J. J. and R. B. did award and determine

that the said W. his executors and administrators, some or one of them, should on, &c. ensuing the date of the said award, at, &c. between the hours, &c. well and truly pay, or cause to be paid, to the said J. his executors, administrators, or assigns, the sum of 247*l.* 9*s.* 3*d.* of good, &c.[4] [and further, by the said award, they the said arbitrators did award and determine, that upon payment of the said sum of two hundred and forty-seven pounds nine shillings and three-pence by the said W. his executors or administrators, to the said J. his executors, administrators, or assigns, the said J. and W. their executors and administrators, should execute general releases each to the other of all actions, claims, and demands whatsoever, from the beginning of the world to, &c.] And the said J. avers that the said W. did not on, &c. (the day appointed for the payment of the money,) at, &c. (the place appointed) between the hours, &c. nor at any other time or place whatsoever hitherto pay, or cause to be paid, to the said J. or his assigns, the said sum of 247*l.* 9*s.* 3*d.* of good, &c. which by the said award was to have been paid by the said W. to the said J. on that day, and at the time and place aforesaid, according to the form and effect of the said award, but therein wholly failed and made default; and the same, and every part thereof, is still wholly unpaid to the said J. whereby an action has accrued to

[4] The clause between [ ] seems to be introduced for the purpose of preventing a demurrer for the want of mutuality; but as that is certainly not now considered as a requisite to constitute a good award, this clause may safely be omitted.—Vid. p. 218—228, and vid. p. 288—289.—What is here said is meant to apply to all between [ ] in the subsequent precedents.

the said J. to demand and have of the said W. the said 247*l.* 9*s.* 3*d.* parcel of the said sum of 500*l.* above demanded. AND WHEREAS the said W. afterwards, to wit, on, &c. at, &c. aforesaid, borrowed of the said J. 252*l.* 10*s.* 9*d.* to be paid to the said J. when he the said W. should be thereto afterwards requested, by means whereof an action has accrued to the said J. to demand and have of and from the said W. the said 252*l.* 10*s.* 9*d.* residue of the said sum of 500*l.* above demanded: yet the said W. although often requested, has not as yet paid the said sum of 500*l.* nor any part thereof, to the said J. but has hitherto refused, and still does refuse, to pay the same, or any part thereof, to the said J. to the damage of him the said J. of twenty pounds; and therefore the said J. brings suit, &c.

---

## DECLARATION *in* DEBT *on an* AWARD *made by an* UMPIRE.

LANCASHIRE } T. L. complains of J. S. being, &c.
TO WIT. } in a plea that he render to the said T. 60*l.* which he owes to and unjustly detains from him: FOR THAT WHEREAS on, &c. at, &c. in, &c. divers disputes, differences, and controversies had arisen, and were depending, between the said T. and the said J. and thereupon, for the putting an end to the said differences, disputes, and controversies, they the said T. and J. on the same, &c. at, &c. submitted themselves to stand to the award, order, and final determi-

nation of C. D. of, &c. and L. B. of, &c. arbitrators indifferently named, elected, and chosen, as well on the part and behalf of the said J. as of the said T. to award, order, judge, and determine, of and concerning the premises, so as their award should be made in writing, under the hands and seals of the said C. D. and L. B. ready to be delivered to the said parties on or before, &c. and if the said C. D. and L. B. should not make their award in writing, under their hands and seals, ready to be delivered to the said parties on or before, &c. then the said T. and J. submitted themselves to stand to, abide by, perform, and keep the award and final determination of E. F. of, &c. indifferently elected and chosen by and between the said parties for finally determining the said differences, disputes, and controversies, so as the said E. F. should make his award in writing, under his hand and seal, ready to be delivered to the said parties on or before, &c.—and the said T. in fact says, that the said C. D. and L. B. the arbitrators aforesaid, did not make their award in writing concerning the premises, ready to be delivered to the said parties, within the time in that behalf limited as aforesaid, but intirely omitted so to do: And the said T. further in fact, says, that afterwards, and within the time in that behalf limited for the aforesaid E. F. to make his award as aforesaid, concerning the premises, to wit, on, &c. at, &c. he the said E. F. having taken upon himself the burthen of the said award, in due manner made his award of and concerning the premises, in writing under his hand and seal, ready to be delivered to the said parties, or such of them who should require the same; and thereby he the said E. F. did then and there order and award that [all actions,

suits, quarrels, and controversies whatsoever, had, made, moved, arisen, or depending by or between the said parties at any time before, &c. then last past, either in law or equity, for any manner or cause whatsoever, touching the said differences and disputes, should cease, determine, and be no further prosecuted or proceeded in; and the said E. F. did, by his said award, further award, order, and determine, that] the said J. his executors or administrators, should pay, or cause to be paid, unto the said T. his executors or administrators, the sum of 30*l.* at, &c. on, &c. then next, between the hours, &c. [And, lastly, the said E. F. did, by his said award, further order and award, that on payment of the said sum of 30*l.* as aforesaid, each of the said parties should execute to the other a general release of all matters and differences between them, from the beginning of the world until, &c.] of all which premises he the said J. afterwards, to wit, on the said, &c. at, &c. aforesaid, had notice. [And the said T. in fact, further says, that all actions, suits, quarrels, and controversies whatsoever, had, made, moved, arisen, or depending by or between the said parties at any time before, &c. in the said award mentioned, did then and there, on the part of the said T. entirely cease and determine, and have not been any further prosecuted or proceeded in,] yet the said J. did not pay, or cause to be paid, to the said T. the said sum of 30*l.* so awarded to be paid as aforesaid, or any part thereof, at the said time and place appointed for the payment thereof as aforesaid, nor at any other time or place whatsoever, but hath therein wholly failed and made default, whereby an action has accrued to the said T. to demand and have of the said J. the said 30*l.* parcel of the

said 60*l.* above demanded: and whereas the said J. afterwards, to wit, on, &c. at, &c. borrowed of the said T. 30*l.* residue of the said 60*l.* above demanded, to be paid to the said T. when he the said J. should be thereto afterwards requested; yet the said J. although often requested, &c.—Damages 10*l.*

---

DEBT *on an* AWARD *by* UMPIRAGE, *against* DEFENDANT *and his* SURETY *in the* ARBITRATION BOND.

YORKSHIRE } J. C. complains of W. F. and J. T.
TO WIT. } being, &c. of a plea that they render to him the sum of 77*l.* 5*s.* of lawful, &c. which they owe to and unjustly detain from him: FOR THAT WHEREAS before the time of the submission hereafter next mentioned, at B. in the county of Y. certain controversies and disputes had arisen and were depending between the said J. C. and the said W. and thereupon the said J. C. and the said W. for themselves severally, and the said J. T. as surety on behalf of the said W. for the settling and determining of the said controversies and disputes heretofore, to wit, on, &c. at, &c. aforesaid, in writing, submitted themselves to the award, arbitrament, and determination of one W. H. and one Jer. Th. arbitrators indifferently named as well on the part of the said W. F. and J. T. as of the said J. C. to arbitrate, judge, and determine of and concerning all controversies and demands whatsoever between the said parties, or any of them, so as the said

award were made in writing, and ready to be delivered to the parties requesting the same, on or before, &c. but if the said arbitrators should not make such their award by the time aforesaid, then to the award, arbitrament, umpirage, and determination of such third person, as umpire, as they the said arbitrators should name, elect, and choose between the said parties, of and concerning the premises, so as the said umpire should make his award or umpirage of and concerning the same, in writing, on or before, &c.—and the said J. C. says, that the said W. H. and Jer. Th. the said arbitrators, after the said submission, to wit, on, &c. at B. aforesaid, duly named, elected, and chose one J. P. umpire between the said parties, of and concerning the premises, according to the form and effect of the said submission; and that the said arbitrators did not make any award of or concerning the same within the time to them limited for that purpose: and the said J. C. further says, that the said J. P. so named umpire as aforesaid, having taken upon himself the burthen of the said umpirage, did afterwards, and within the time to him limited for the purpose as aforesaid, to wit, on, &c. at B. aforesaid, make and publish his award and umpirage of and concerning the premises, in writing under his hand and seal, ready to be delivered to the parties requesting the same (and which the said J. C. now brings here into court) and did thereby award, arbitrate, and determine that the said W. F. and J. T. or one of them, should pay, or cause to be paid, unto the said J. C. his executors or administrators, the sum of 25*l.* 15*s.* of lawful, &c. at, &c. in B. aforesaid, on, &c. between the hours, &c. and the further sum of 25*l.* 15*s.* of like, &c. at the same hour, on, &c. and in default of the first-

mentioned sum of 25*l.* 15*s.* upon the day and time for that purpose first mentioned, then that the said W. F. and J. T. or one of them should pay to the said J. C. his executors or administrators, the whole sum of 51*l.* 10*s.* on demand; [and that upon the payment of the two several sums of 25*l.* 15*s.* and 25*l.* 15*s.* each party should execute to the other a general release to the day of the date of the said submission,] as by the said umpirage, relation being thereunto had, will more fully appear. And the said J. C. further saith, that the said W. F. and J. T. did not, nor did either of them, pay, or cause to be paid, unto the said J. C. the said sum of 25*l.* 15*s.* in the said umpirage first mentioned, or any part thereof, at the time and place thereby appointed for the payment thereof; but although the said J. C. then and there requested them to pay the same, therein wholly made default; and that thereupon the said J. C. afterwards, to wit, on, &c. at B. aforesaid, demanded the whole sum of 51*l.* 10*s.* mentioned in the said umpirage, from the said W. F. and J. T. who then and there wholly refused and neglected to pay the same, whereby an action has accrued to the said J. C. to demand and have of and from the said W. F. and J. T. the said sum of 51*l.* 10*s.* parcel of the said sum of 77*l.* 5*s.* above demanded: AND WHEREAS before the time of the submission hereafter mentioned, at B. aforesaid, certain other controversies and disputes had arisen and were depending between the said J. C. and the said W. F. and thereupon the said J. C. and the said W. F. for themselves severally, and the said J. T. as a surety for the said W. F. for the settling and determining thereof heretofore, to wit, on the said, &c. at B. aforesaid, in writing, submitted themselves to the

award, &c. of the said W. H. and Jer. Th. arbitrators indifferently named, as well on the part of the said W. F. and J. T. as of the said J. C. to arbitrate, &c. so as the said award were made in writing, ready to be delivered to the parties requesting the same on or before, &c. but if the said arbitrators should not make such their award by the time aforesaid, then to the award, arbitrament, &c. of such third person, as umpire, as they the said arbitrators should name, &c. between the said parties of and concerning the premises last aforesaid, so as the said umpire should make his award or umpirage of and concerning the same, in writing, on or before, &c.—and the said J. C. says, that the said W. H. and Jer. Th. after the said last mentioned submission, to wit, on, &c. duly named, &c. the said J. P. umpire between the said parties, of and concerning the premises last aforesaid, according to the form and effect of the said last mentioned submission, and that the said arbitrators did not make any award of and concerning the same within the time to them limited for that purpose; and the said J. C. further says, that the said umpire so named, &c. as last aforesaid, having taken upon himself the burthen of the said last mentioned umpirage, did afterwards, and within the time to him limited for that purpose as aforesaid, to wit, on, &c. at B. aforesaid, make and publish his award or umpirage of and concerning the said last mentioned premises, in writing under his hand and seal, ready to be delivered to the parties requesting the same (and which the said J. C. now brings here into court,) and did thereby, among other things, award, &c. that the said W. F. and J. T. or one of them, should pay or cause to be paid to the said J. C. his executors, or

administrators, the sum of 25*l.* 15*s.* of lawful, &c. at, &c. on, &c. between the hours, &c. as by the said last mentioned umpirage, relation being thereunto had, more fully appears: And the said J. C. further says, that the said W. F. and J. T. did not nor did either of them pay or cause to be paid unto the said J. C. the said sum of 25*l.* 15*s.* in the said last award mentioned, or any part thereof, at the time and place thereby appointed for the payment thereof, but that they and each of them wholly refused and neglected to pay the same, whereby an action hath accrued to the said J. C. to demand and have of and from the said W. F. and the said J. T. the said last mentioned sum of 25*l.* 15*s.* residue of the said sum of 77*l.* 5*s.* above demanded: Yet the said W. F. and J. T. although often severally requested, &c. have not, nor hath either of them paid the said sum of 77*l.* 5*s.* above demanded, or any part thereof, to the said J. C. but have and each of them hath hitherto wholly refused, and refuse, and each of them refuses so to do, to the damage of the said J. C. of 20*l.* and therefore he brings suit, &c.

DECLARATION *in* DEBT *on an* AWARD *made in pursuance of an* ORDER *of* REFERENCE *at the* ASSIZES *on withdrawing a* JUROR, *and where one of the* ARBITRATORS *refused to act.*

CORNWALL } M. W. late of, &c. surgeon, was
TO WIT. } summoned to answer to J. M. and J. P. gentlemen, assignees of the estate and effects of D. P. a bankrupt, according to the form and effect of the statutes, &c. of a plea, that he render to them 150*l.* of lawful, &c. which he owes to and unjustly detains from them, &c. and thereupon the said J. M. and J. P. assignees as aforesaid, by J. A. their attorney complain; for that WHEREAS on, &c. at, &c. divers differences, &c. had arisen and were depending, and suits at law and in equity were also depending between the said J. M. and J. P. assignees as aforesaid, and the said M. W. and WHEREAS at the assizes held at, &c. in and for the county of C. aforesaid, on, &c. a certain cause then depending between the said J. M. and J. P. assignees in form aforesaid, and the said M. W. was then and there to have been tried between them; and WHEREAS by an order made at the said assizes so held at, &c. in and for the county aforesaid, on, &c. to wit, at, &c. in the said cause, wherein the said J. M. and J. P. as assignees of the estate and effects of the said D. P. were plaintiffs, and the said M. W. was defendant; it was ordered by the court, by and with the consent of all parties, their counsel and attornies, that the last of the jurors impanneled and sworn to determine the issue joined between the said parties in

that cause should be withdrawn, and that all matters then in difference between the said parties should be referred to the award, &c. of H. J. D. and D. V. both of, &c. and J. R. of, &c. stiled, in the said order, gentlemen, or to any two of them; and that the said parties should perform the award of the said arbitrators, or of any two of them, so as they should make and publish the same of and concerning the premises in writing on or before the first day of the then next Michaelmas term; and it was also ordered, by and with the like consent, that such witness or witnesses as should be produced by the said parties or any of them before the said arbitrators for examination, should be sworn before a Commissioner of his Majesty's Court of C. B. and that the bill in equity then depending between the said parties should be dismissed upon making the said award, as the said arbitrators should determine; and that no other bill in equity should be preferred by either or any of the said parties against the other for or relating to the matters in dispute between them; and it was further ordered, by and with the like consent, that no bill in equity should be preferred by the said parties, or any of them, against the said arbitrators, or either of them, for or in respect of any award they should make in the said premises; and that that order should be made a rule of his Majesty's Court of C. B. if the Justices of that Court should so please, as in and by the said order, relation being thereto had, more fully appears: and the said J. M. and J. P. assignees as aforesaid, in fact say, that the said J. M. and J. P. assignees as aforesaid, for themselves, and the said M. W. for himself, did on, &c. submit to such award, and the said H. J. D. and D. V. two of

the arbitrators aforesaid, having taken upon themselves the business and charge of the said award, and having heard at large the allegations and proofs of the said parties, and having examined the witnesses produced before them on oath, and duly and deliberately weighed and considered the whole, did on, &c. being within the time limited as aforesaid for the making of their award of and concerning the premises, at, &c. make and publish their award in writing of and concerning the premises, under their hands and seals, and ready to be delivered to the said parties, or to such of them as should desire the same, on, &c. (the said J. R. after having entered on the business of the said award with them the said H. J. D. and D. V. refusing to join with them in the said award.) And by the said award, they the said arbitrators did award, &c. that the said M. W. his executors or administrators, should, on, &c. between the hours, &c. at, &c. well and truly pay, or cause to be paid to the said J. M. and J. P. their executors and administrators, the full sum of 150*l.* of lawful, &c. in full satisfaction and discharge of the debts, &c. which they the said J. M. and J. P. or either of them had or could have or make upon or against the said M. W. for or in respect of any matter, cause, or thing whatsoever, to the said, &c. [and should within the time and at the place aforesaid, at his and their own proper costs and charges, deliver or cause to be delivered to the said J. M. and J. P. or their attorney, executors, or administrators, a general release, &c. (setting forth the description of the release in terms of the award): And the said two arbitrators did also by their award further award, &c. that upon and immediately after such payment of the aforesaid

sum of 150*l.* and delivery of such release duly executed to the said J. M. and J. P. as aforesaid, they the said J. M. and J. P. should, at their own proper costs and charges, deliver, or cause to be delivered unto him the said M. W. or his attorney, executors, or administrators, a general release, &c. (to be stated in the terms of the award)]: And the said arbitrators did by their said award further award, &c. that the aforesaid bill in equity depending between the said parties, and mentioned in the said recited order to be dismissed upon making their award, should be dismissed without costs, as by the said award, relation being thereto had, will more fully appear; and the said J. M. and J. P. futher say, that [there was not any other matter or thing whatsoever except between the said J. M. and J. P. as assignees as aforesaid, and the said M. W. depending between the said parties, or any of them, at the time of the said submission, or at the time of the making of the said award, or on the said, &c. and that] the said M. W. did not on, &c. in the said award mentioned, between the hours, &c. at, &c. or at any other time or place hitherto, pay or cause to be paid to them the said J. M. and J. P. or to either of them, the said sum of 150*l.* in the said award mentioned, or any part thereof; but therein wholly failed and made default, by means whereof an action has accrued, &c. Yet the said M. W. although often requested, has not yet rendered the aforesaid sum of 150*l.* above demanded, or any part thereof, to the said J. M. and J. P. assignees as aforesaid, or to either of them, but he to render the same, &c. to the damage, &c.[1]

[1] For more examples of Debt on the Award, vid. Wentworth's Pleader, vol. 5, p. 336—356.

## DEBT ON BOND,

*Conditioned for the* PERFORMANCE *of an* AWARD; *where* DEFENDANT *prays* OYER *of the* CONDITION, *and pleads "No* AWARD, *&c."*

YORKSHIRE } J. B. complains against J. W. being,
TO WIT. } &c. of a plea that he render to him the said J. B. 200*l.* of lawful, &c. which he owes to and unjustly detains from him: For that WHEREAS the said J. W. on, &c. in the year, &c. at, &c. in the county of York, by his certain writing obligatory sealed with the seal of the said J. W. and now shewn to his Majesty's Court here, the date whereof is on the day and year aforesaid, acknowledged himself to be held and firmly bound to the said J. B. by the name and description of, &c. in the sum of 200*l.* to be paid to the said J. B. when the said J. W. should be thereunto afterwards requested: Yet the said J. W. although often requested, has not yet paid the said sum of 200*l.* above demanded, nor any part thereof, to the said J. B. but to pay the same, or any part thereof, to the said J. B. he the said J. W. has hitherto wholly refused, and still does refuse, to the damage of the said J. B. of 10*l.* and therefore he brings his suit, &c. pledges, &c.

AND the said J. W. by C. Owen, his attorney, comes and defends the wrong and injury when, &c. and craves oyer of the said writing obligatory, which is read to him; he also craves oyer of the CONDITION of the said writing obligatory, which is read to him in these words, to wit, (here set out the Condition of the

Bond *verbatim*) which being read and heard, the said J. W. says that the said J. B. ought not to have or maintain his aforesaid action against him, because he says that the said arbitrators in the said condition of the said writing obligatory named, made no award in writing under their hands within the time limited in the said condition of the said writing obligatory, nor did the said R. W. in the said writing obligatory mentioned as umpire in that event, make any award or umpirage in the premises in writing under his hand within the time for that purpose, in the said condition of the said writing obligatory expressed, nor did the said arbitrators choose any other person as umpire; and this the said J. W. is ready to verify; wherefore he prays judgment, if the said J. B. ought to have or maintain his aforesaid action thereof against him.

AND the said J. B. as to the plea of the said J. W. by him above pleaded, says, that he by reason of any thing therein contained ought not to be barred from having and maintaining his aforesaid action against the said J. W. because he says, that although true it is that the said S. A. and J. C. the arbitrators in the said condition of the said writing obligatory mentioned, made no award in writing of and concerning the premises under their hands within the time for that purpose limited in the said condition of the said writing obligatory, as in the said plea is mentioned; nevertheless, for replication in this behalf, the said J. B. says, that after the expiration of the said time limited for the said S. A. and J. C. the said arbitrators in the said writing obligatory named, making their award, to wit, on, &c. at, &c. the said R. W. the umpire in the said condition of the said writing obligatory named, having taken upon

himself the burthen of the said award, and having fully examined and duly considered the premises submitted and referred as aforesaid, made his award or umpirage in writing, subscribed with his own hand, in manner following, that is to say, (here set forth the award): of which said award the said J. W. afterwards, to wit, on, &c. at, &c. had notice; and the said J. B. in fact says that (here set forth the breach): and this the said J. B. is ready to verify; wherefore he prays judgment and his debt aforesaid, to be adjudged to him, &c:

If the award as set forth in the replication be exceptionable in point of law, or the breach improperly assigned, then the defendant may demur: Thus—

AND the said J. W. as to the said plea of the said J. B. by him above pleaded in reply to the said plea of the said J. W. by him above pleaded in bar, says that the said plea so above pleaded, and the matters therein contained, are not sufficient in law to maintain the said action of the said J. B. against him the said J. W. to which said replication, in manner and form as the same is above pleaded and set forth, the said J. W. is under no necessity, nor is he obliged by the law of the land to answer; wherefore, for want of a sufficient replication in this behalf, the said J. W. as before prays judgment, and that the said J. B. may be precluded from having and maintaining his aforesaid action against him the said J. W.

But if the award be partially set forth in the replication, so that the part omitted, being connected with the part set forth, would render the whole void, then the defendant

may support his plea of "no award," by rejoining that the arbitrators, &c. made "no such award:" Thus—

AND the said J. W. says, that the said R. W. did not make any such award of or concerning the premises aforesaid as the said J. B. has above in his replication alleged; and of this he puts himself upon the country, &c.

## PLEA

*To an* ACTION *on a* BOND *of* ARBITRATION, *setting forth the* AWARD, *and alleging* PERFORMANCE.

AND the said J. W. by C. D. his attorney, comes and defends the wrong and injury, when, &c. and prays oyer of the said writing obligatory, and it is read to him, and he also prays oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit: (here set forth the condition *verbatim*) which being read and heard, the said J. W. says that the said J. B. ought not to have or maintain his aforesaid action against him, because he says that the said H. B. and H. F. in the said condition of the said writing obligatory named as arbitrators, after the making of the said writing obligatory, and before, &c. to wit, on, &c. at, &c. took upon themselves the burthen of the execution of the said arbitrament in the said condition mentioned, and then and there did make and publish their award in writing under their hands and seals, of

and concerning the premises so to them referred as aforesaid; by which said award (after reciting, &c.) they the said arbitrators did award and order that, &c. (here set forth the award): as by the said award which the said J. W. now brings into court here, fully appears: And the said J. W. in fact says that, &c. (here aver performance in terms of the award) in manner and form as in and by the said award is directed, and according to the true intent and meaning thereof, and of the condition of the said writing obligatory, to wit, at, &c. And this he the said J. W. is ready to verify; wherefore he prays judgment if the said J. B. ought to have or maintain his aforesaid action against him.

And the said J. B. as to the said plea of the said J. W. by him above pleaded in bar, says, that he by reason of any thing therein alleged, ought not to be barred from having and maintaining his aforesaid action against him the said J. W. because he says that after the said award and order in the said plea mentioned had been and was so made as aforesaid, and after, &c. (here set forth the breach alleged) contrary to the form, tenor, and effect of the said award, whereby the condition of the said writing obligatory became and was broken and forfeited, and the said writing obligatory in full force and virtue; and this he the said J. B. is ready to verify; wherefore he prays judgment, and the debt aforesaid, together with his damages by him sustained on occasion of the detaining thereof, to be adjudged to him, &c.[1]

[1] For more examples vid. 356. and p. 454—465. Vid. Wentworth's Pleader, vol. 5. p. ante, p. 290—310.

## PLEA OF AN AWARD,

*In bar of an* ACTION *on the original* CAUSE.[1]

AND the said John, by T. H. his attorney, comes and defends the wrong and injury, when, &c. and says that the said Richard ought not to have or maintain his aforesaid action against him, because he says that after the several promises and undertakings aforesaid, above supposed to have been made by him, and before the day of obtaining the original writ of the said Richard, (or, of exhibiting the bill of the said Richard), to wit, on, &c. at, &c. the said Richard and John submitted themselves to stand to the award, order, and judgment of one Osmund Fox, as well of and concerning the promises and undertakings aforesaid, above supposed to have been made, as of all other matters and things then depending in controversy between them; which arbitrator having taken upon himself the burthen of the said award, afterwards, to wit, on, &c. at, &c. awarded, ordered, and adjudged between them the said Richard and John, of and concerning the premises so referred to him as aforesaid, in manner and form following, to wit, that the said John should pay to the said Richard 5*l.* within 10 days thence next following, at, &c. and that all other claims of any other debts or accounts between them the said Richard and John should be null and void; and that upon the

[1] Vid. ante, p. 381 et seq.

said payment of the said 5*l.* the said Richard and John should give each to the other a general release of all matters and things depending between them from the beginning of the world to the time of payment of the said 5*l.* And the said John further says that no cause of action has arisen or grown between them the said Richard and John from the time of the aforesaid submission to the end of the aforesaid ten days: And that the said John, within the said ten days, to wit, on, &c. at, &c. offered to pay to the said Richard the aforesaid 5*l.* and then and there offered to deliver to the said Richard as his act and deed a certain release in writing by him the said John prepared and sealed, bearing date the same day and year last aforesaid, whereby the said John was expressed to have released to the said Richard all matters and things depending between them the said Richard and John from the beginning of the world to the day of the date of the said release, which said 5*l.* or the said release the said Richard, of the said John to receive on the said, &c. at, &c. altogether refused. And this the said John is ready to verify; whereupon he prays judgment if the said Richard ought to have or maintain his aforesaid action against him, &c.

And the said Richard says that he by reason of any thing by the said John in his said plea above pleaded in bar, alleged, ought not to be barred from having his aforesaid action against the said John; because, protesting that the said John did not offer to pay to the said Richard the said 5*l.* nor to deliver to the said Richard any writing of release by the said John prepared and sealed as the said John has above in his said plea alleged, for replication thereto the said Richard says that true it is that they the said Richard and John,

after the several promises and undertakings aforesaid, above as aforesaid made, and before the obtaining of the original writ of the said Richard, submitted themselves to stand to the award, order, and judgment of the said Osmund Fox, as well of and concerning the aforesaid promises and undertakings as of and concerning all other matters and things then depending in controversy between them; but the said Richard further says that the said submission was made under this condition, that the said Osmund should make his award, order, and judgment of and concerning the premises on or before, &c. And that he the said Osmund did not on or before, &c. make his award, order, and judgment in manner and form as the said John has above in his said plea alleged, and this he the said Richard is ready to verify; whereupon he prays judgment and his damages on occasion of the nonperformance of the promises and undertakings aforesaid to be adjudged to him.[1]

[1] Vid. Clift's Entries, 195, and Wentworth's Pleader, Vol. 3, p. 144.

## BILL

*To* SET ASIDE *an* AWARD, *the Arbitrators having made improper Allowances to the Party against whom the Bill is filed.*

To the Right Honourable Alexander Lord Loughborough, Baron of Loughborough, in the County of Leicester, Lord High Chancellor of Great Britain,

Humbly complaining, sheweth unto your Lordship your orator W. K. of, &c. in the county of, &c. upholsterer, that some time in or about the month of in the year your orator entered into partnership with R. K. of the same place, in the trade or business of an upholsterer and paperman, and continued to carry on the said trade or business, in conjunction with the said R. K. without any written articles till the beginning of the month of in the year and your orator further sheweth unto your Lordship, that by indenture, bearing date the day of in the said year and made between the said R. K. and your orator, the said R. K. and your orator agreed to become partners in the said trade or business for the term of seven years, to be computed from the day of but subject to be determined on the events and in the manner in the said indenture particularly described: and it was by the said indenture agreed between the said R. K. and your orator that the said business should be carried on at the warehouses belonging to a certain dwelling-

house, situate No. —, and at a dwelling-house and shop, situate No. —, in, &c. aforesaid, and also at a work-shop and packing-house, adjoining to certain stables in the possession of one Mrs. C. situate also in, &c. aforesaid, or at such other place or places as the said R. K. and your orator should agree upon, under the names and firm of R. K. and Co. and that the said R. K. should advance four-fifths and your orator should advance, or secure to the satisfaction of the said R. K. to be advanced, the remaining fifth of such money as should be necessary to carry on the said business; and that the said R. K. and your orator should be interested in the said business, and be entitled to the net profits, and subject to the losses to arise or accrue from the said business in the proportion of four-fifths to one-fifth respectively; and it was thereby agreed that the messuage or dwelling-house, shops, work-shops, ware-houses, ware-rooms, and packing places, with the appurtenances where the said business should be carried on, should, during the continuance of the said partnership, be held by the said R. K. IN TRUST for the said business, at the yearly rent of 410*l.* clear of all taxes and deductions whatsoever, and paid by the said R. K. and your orator, in the proportion of their respective shares in the said business; and that the said R. K. and your orator should faithfully account the one to the other for all such sums of money, goods, and effects belonging to the said partnership as should at any time or times come to their hands respectively, and that an account of all such sums of money, goods, chattels, and effects, and of all other the dealings and transactions concerning the said partnership, should from time to time be duly entered in proper books of account, to be

himself the burthen of the said award, and having fully examined and duly considered the premises submitted and referred as aforesaid, made his award or umpirage in writing, subscribed with his own hand, in manner following, that is to say, (here set forth the award): of which said award the said J. W. afterwards, to wit, on, &c. at, &c. had notice; and the said J. B. in fact says that (here set forth the breach): and this the said J. B. is ready to verify; wherefore he prays judgment and his debt aforesaid, to be adjudged to him, &c.

If the award as set forth in the replication be exceptionable in point of law, or the breach improperly assigned, then the defendant may demur: Thus—

AND the said J. W. as to the said plea of the said J. B. by him above pleaded in reply to the said plea of the said J. W. by him above pleaded in bar, says that the said plea so above pleaded, and the matters therein contained, are not sufficient in law to maintain the said action of the said J. B. against him the said J. W. to which said replication, in manner and form as the same is above pleaded and set forth, the said J. W. is under no necessity, nor is he obliged by the law of the land to answer; wherefore, for want of a sufficient replication in this behalf, the said J. W. as before prays judgment, and that the said J. B. may be precluded from having and maintaining his aforesaid action against him the said J. W.

But if the award be partially set forth in the replication, so that the part omitted, being connected with the part set forth, would render the whole void, then the defendant

may support his plea of "no award," by rejoining that the arbitrators, &c. made "no such award:" Thus—

AND the said J. W. says, that the said R. W. did not make any such award of or concerning the premises aforesaid as the said J. B. has above in his replication alleged; and of this he puts himself upon the country, &c.

---

## PLEA

*To an* ACTION *on a* BOND *of* ARBITRATION, *setting forth the* AWARD, *and alleging* PERFORMANCE.

AND the said J. W. by C. D. his attorney, comes and defends the wrong and injury, when, &c. and prays oyer of the said writing obligatory, and it is read to him, and he also prays oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit: (here set forth the condition *verbatim*) which being read and heard, the said J. W. says that the said J. B. ought not to have or maintain his aforesaid action against him, because he says that the said H. B. and H. F. in the said condition of the said writing obligatory named as arbitrators, after the making of the said writing obligatory, and before, &c. to wit, on, &c. at, &c. took upon themselves the burthen of the execution of the said arbitrament in the said condition mentioned, and then and there did make and publish their award in writing under their hands and seals, of

himself the burthen of the said award, and having fully examined and duly considered the premises submitted and referred as aforesaid, made his award or umpirage in writing, subscribed with his own hand, in manner following, that is to say, (here set forth the award): of which said award the said J. W. afterwards, to wit, on, &c. at, &c. had notice; and the said J. B. in fact says that (here set forth the breach): and this the said J. B. is ready to verify; wherefore he prays judgment and his debt aforesaid, to be adjudged to him, &c:

If the award as set forth in the replication be exceptionable in point of law, or the breach improperly assigned, then the defendant may demur: Thus—

AND the said J. W. as to the said plea of the said J. B. by him above pleaded in reply to the said plea of the said J. W. by him above pleaded in bar, says that the said plea so above pleaded, and the matters therein contained, are not sufficient in law to maintain the said action of the said J. B. against him the said J. W. to which said replication, in manner and form as the same is above pleaded and set forth, the said J. W. is under no necessity, nor is he obliged by the law of the land to answer; wherefore, for want of a sufficient replication in this behalf, the said J. W. as before prays judgment, and that the said J. B. may be precluded from having and maintaining his aforesaid action against him the said J. W.

But if the award be partially set forth in the replication, so that the part omitted, being connected with the part set forth, would render the whole void, then the defendant

may support his plea of "no award," by rejoining that the arbitrators, &c. made "no such award:" Thus—

AND the said J. W. says, that the said R. W. did not make any such award of or concerning the premises aforesaid as the said J. B. has above in his replication alleged; and of this he puts himself upon the country, &c.

---

## PLEA

*To an* ACTION *on a* BOND *of* ARBITRATION, *setting forth the* AWARD, *and alleging* PERFORMANCE.

AND the said J. W. by C. D. his attorney, comes and defends the wrong and injury, when, &c. and prays oyer of the said writing obligatory, and it is read to him, and he also prays oyer of the condition of the said writing obligatory, and it is read to him in these words, to wit: (here set forth the condition *verbatim*) which being read and heard, the said J. W. says that the said J. B. ought not to have or maintain his aforesaid action against him, because he says that the said H. B. and H. F. in the said condition of the said writing obligatory named as arbitrators, after the making of the said writing obligatory, and before, &c. to wit, on, &c. at, &c. took upon themselves the burthen of the execution of the said arbitrament in the said condition mentioned, and then and there did make and publish their award in writing under their hands and seals, of

the first part, your orator of the second part, and the said D. S. and J. A. of the third part: After reciting, among other things, to the purport and effect hereinbefore set forth, and also that in the execution of the aforesaid powers and performance of the said trusts, they the said D. S. and J. A. had found the said partnership concerns of the said R. K. and your orator so extensive, complicated, and deranged, as to render it impossible for them the said D. S. and J. A to proceed to a final arrangement or settlement thereof, and that the said E. S. and J. A. had in consequence thereof proposed, and the said R. K. and your orator had agreed to submit the further investigation and final arrangement or settlement of the said partnership accounts and concerns according to the aforesaid trusts to J. H. of, &c. in the county of, &c. upholder, J. B. of, &c. in the said county, gent. and J. D. of, &c. in the city of, &c. accountant, in the manner therein and hereinafter mentioned; and that the said R. K. and your orator had also agreed to enter into mutual bonds bearing even date with the said indenture now in recital, for the due and punctual performance of all the covenants, clauses, and agreements in the said indenture contained: IT IS by the said indenture now in recital WITNESSED, that in order to carry into effect the trusts in the said indenture of the of in the year contained, or such of them as then remained unexecuted, and were capable of taking effect, it was agreed and declared by all the parties to the indenture now in recital, and particularly that the said R. K. and your orator, by and with the privity and consent of the said D. S. and J. A. DID, for themselves severally and respectively, and for their

several and respective heirs, executors, and administrators, covenant, promise, declare, and agree each with the other of them, his executors, and administrators, that all and every action and actions, cause and causes of action, suits, bills, bonds, specialties, covenants, contracts, accounts, agreements, promises, payments, allowances, reckonings, monies, matters, and things whatsoever in any way relating to or concerning the said partnership, or the TRUSTS hereinbefore mentioned, and all and every doubt or doubts, question or questions, dispute and disputes, touching or in any manner concerning the rights, claims, demands, or pretences, matters, or things relating thereto, of the said R. K. and your orator, or either of them, in or about the said partnership affairs or concerns, should be referred and submitted to the award, order, final end, and determination of the said J. H.—J. B.—and J. D. or any two of them, arbitrators indifferently elected, chosen, and named, as well on the part and behalf of the said R. K. as on the part and behalf of your orator, to arbitrate, award, order, judge, and determine as aforesaid, so as the same should not interfere with the arrangement or settlement then already made by the said D. S. and J. A. in pursuance of the trusts in the said indenture of the day of in the year contained and hereinbefore set forth, unless some error or mistake should appear therein, contrary to the true intent and meaning of the said indenture of copartnership and indenture made on the dissolution of the same, and so as the said J. H.—J. B. and J. D. or any two of them, should make their award or determination of and concerning the premises, in writing under their hands and seals, ready to be delivered to

the said parties in difference requiring the same on or before the day of next ensuing the date of the said indenture now in recital: and it was thereby also agreed by and between all the parties thereto that the submission thereby made of the said matters in controversy should be made a rule of his Majesty's Court of King's Bench, in pursuance of the statute in such case made and provided, as by the said indenture of submission, now in the hands or possession of the said D. S.—J. A. and R. K. or of some or one of them, or in their, or some or one of their, custody or power, when produced to this honourable court, will, among other things, more fully and at large appear. And your orator further sheweth unto your Lordship, that by deed poll, indorsed on the said indenture of submission, bearing date the day of in the year and executed, as well by the said R. K. and your orator as by the said D. S. and J. A. the time for the said arbitrators, or any two of them, making their award in the premises is enlarged to the day of then next ensuing; and the said R. K. and your orator, by their several and respective bonds or obligations, each bearing date respectively the said day of became bound the one to the other of them in the penal sum of 1000*l.* for the due performance and observance of all and singular the covenants, conditions, and agreements in the said indenture of submission contained: and your orator further sheweth unto your Lordship, that although the said D. S. and J. A. had, by virtue of the powers vested in them by the said indenture of the day of disposed of all, or the greater part, of the estate and effects of the said R. K. and your orator, and received

many sums of money, to a very large amount in the whole, and were subject to account to the said R. K. and your orator for the application thereof; and though they are parties to the said indenture of submission, yet there is no covenant, condition, proviso, or agreement therein on their part, or on the part of either of them, by which they could be bound to the performance of the award of the said arbitrators; and such award, if made in favour of your orator, against the said D. S. and J. A. would have been altogether ineffectual. And your orator further sheweth unto your Lordship, that the said arbitrators met a great many times at the house of the said J. H. who is the nephew and successor in business of the said D. S. and where the said D. S. then resided, for the purpose of examining the accounts of the said partnership and the execution of the trusts vested in the said D. S. and J. A. and the said D. S. attended the said arbitrators daily, and assumed a tone of authority over them, and dictated the manner in which the accounts should be taken and settled; but he refused to be sworn to the truth of the disbursements he charged to the account of the said copartnership, and to produce vouchers for the same;—nevertheless the said J. H. and J. D. made an award, bearing date the day of last, by which they ordered that your orator should on the day of then next, pay to them the said D. S. and J. A. the sum of 630*l.* 12*s.* 6½*d.* and should also, on the day of then next, pay to the said R. K. the sum of 435*l.* 16*s.* 3½*d.* the said J. B. dissenting from the said award: and your orator further sheweth unto your Lordship, that in taking the accounts between the said R. K. and your orator, as

partners, and the said R. K. and your orator and the said D. S. and J. A. as trustees as aforesaid, the said J. H. and J. D. charged to the account of the said partnership several considerable sums which ought to have been charged to the private account of the said R. K. and gave credit to the said trustees for sums which they had never paid, and omitted to charge them with very large sums which they had received on account of the said partnership, for which they had not given credit thereto, although objection was taken at the time on behalf of your orator to such improper charges and allowances respectively: and in particular your orator sheweth unto your Lordship, that the said R. K. having, before the commencement of the said partnership, borrowed of one J. D. the sum of 3000*l.* on his own private account, attorned, as tenant to the said J. D. of the premises in, &c. where the said business was carried on, giving him power to distrain for the interest of the said principal sum as for rent in arrear; and the said D. S. and J. A. having charged in their trust accounts the sum of 109*l.* 15*s.* 10*d.* as paid to the said J. D. the said J. H. and J. D. allowed the same as charged to the partnership account, on pretence that the payment thereof was for the benefit of the said partnership, in preventing the partnership effects from being distrained, though it was objected on behalf of your orator that the said payment, being in discharge of a debt due from the said R. K. ought not to be allowed as a payment by the said trustees on account of the partnership: And your orator further sheweth unto your Lordship, that though the partnership between your orator and the said R. K. was dissolved on the day of in the year and your orator

was therefore not liable for the payment of rent for the premises on which the said business was carried on, your orator having quitted them and left them in the occupation of the said R. K. by mutual consent, yet the said J. A. and J. D. allowed to the said trustees the sum of 65*l.* 12*s.* 6*d.* charged to the partnership account, though paid for a quarter's rent for the house of the said R. K. in, &c. up to Lady-day and the sum of *l.* for a quarter's rent up to the same time for the premises of the said R. K. in, &c. and the sum of 30*l.* 0*s.* 4*d.* charged to have been paid to — F. on the day of and the sum of 23*l.* 12*s.* charged as paid to B. C. on the day of and the sum of 18*l.* 10*s.* charged as paid to T. S. Esq. and the sum of 21*l.* 10*s.* 6*d.* charged as paid for rent of stables belonging to the said R. K. all which several sums the said J. H. and J. D. put to the debit of the said partnership, in account with the said trustees, although it was objected on behalf of your orator, as the truth is, that they were payments made on the private account of the said R. K. And your orator further sheweth unto your Lordship, that the said J. H. and J. D. have put to the debit of the said partnership account the several sums of 23*l.* 18*s.* charged by the said trustees as paid to one — D. as the amount of the said R. K.'s note to him for his the said R. K.'s children's education, the sum of 9*l.* 17*s.* 6*d.* charged as paid to one — S. for saddlery furnished for the said R. K. on his private account, the sum of 17*l.* 1*s.* 6*d.* charged as paid to one — E. on the private acceptance of the said R. K. and 17*l.* 4*s.* 10*d.* charged as paid to one — S. a person of whom your orator has no knowledge, and of whom he never heard till long after the

time when the said sum is charged to have been paid to him, and which your orator alleges, if in fact paid by the said trustees, must have been paid by them on account of the said R. K. only, and not on account of the said partnership. And your orator further sheweth unto your Lordship, that the said R. K. having certain bonds of one — B. deposited the same in the hands of R. and Co. as a security for money to be raised on the acceptances of the said R. and Co. and two bills of exchange, accepted by them in favour of your orator and the said R. K. for 100*l.* and 64*l.* 18*s.* 8*d.* and indorsed by your orator and the said R. K. having been, in consequence of being dishonoured by the said R. and Co. paid by the said trustees, the said J. H. and J. D. have debited the said partnership with the amount thereof in account with the said trustees, although they have allowed the amount of the said bonds in favour of the said R. K. against your orator, and although it was objected on behalf of your orator that such payments ought therefore to have been put to the private account of the said R. K.—And your orator further sheweth unto your Lordship, that the said J. H. and J. D. have allowed to the said D. S. in his trust account with the said partnership the sum of 500*l.* being the amount of a bill accepted by Lord O. or by Lord and Lady O. which the said D. S. pretended he had transferred to one J. C. in satisfaction of some pretended claims by the said J. C. against the said partnership, whereas in truth the said partnership was not at all indebted to the said J. C.— and your orator charges, that if the said bill was in fact transferred to the said J. C. it was so transferred by the said D. S. on account of a private debt of the said R. K.—And your orator further

sheweth unto your Lordship, that the said J. H. and J. D. refused to charge the said D. S. in his trust account with the said partnership, with the sum of 1000*l.* the amount of a bill accepted by the said Lord O. or by Lord and Lady O. and indorsed by the said R. K. and your orator to the said D. S. although it clearly appeared that the said D. S. had received the said sum of 1000*l.* in payment of the said bill: And your orator further sheweth unto your Lordship, that if in taking the said accounts due credit had been given to the said partnership, and proper charges had been made to the debit of the said trustees, and no improper charges had been made to the debit of the said partnership, your orator would have appeared to be but little, if any thing, indebted to the said R. K. on account of the said partnership, and the said trustees, instead of having any demand against the said partnership, would have appeared to be considerably indebted to it; and your orator is well assured that if the said J. H. and J. D. had followed the suggestions of their own minds, and had not been influenced by the said D. S. in the manner of making up the said accounts, they would not have made an award so much to the prejudice of your orator; and your orator has frequently since the making of the said award, by himself and others, applied in a friendly manner to the said R. K.—D. S. and J. A. and requested them to come to a fair and just account with your orator, and to make to your orator all fair and just allowances, and to pay to your orator what, if any thing, on the taking of such account, shall appear to be due to him; your orator at the same time offering to pay to them, or either of them, whatever sum or sums should, if any thing should, appear to be

due from your orator to them or either of them: BUT NOW SO IT IS, may it please your Lordship, that the said R. K.—D. S. and J. A. combining and confederating themselves together, and to and with divers other persons at present unknown to your orator, whose names when discovered your orator prays may be inserted in this his bill of complaint, and they made parties hereto, and contriving how to injure your orator in the premises, not only refuse to comply with such reasonable request, but threaten to put the said bond in suit against your orator, or to commence an action or actions against your orator on the said award, or to apply to the court of King's Bench for an attachment against your orator for nonperformance thereof; sometimes pretending that all fair and just allowances have been made to your orator by the said J. H. and J. D. in taking the said accounts, and that all proper charges have been made against them the said D. S. and J. A. and that the said partnership has been justly and properly charged with the said several sums against which your orator complains, the contrary of which your orator charges to be true, and that not only the said partnership has been improperly charged with such sums, and credit given to the said trust account against the said partnership for such sums, but that no charge has been made in favour of the said partnership against the said trustees for many large sums actually received and unaccounted for by them; and this the said R. K.—D. S. and J. A. well know to be true, and will sometimes admit, but then they pretend that the said award is conclusive against your orator, and that your orator is thereby barred in equity from having the said accounts opened and reinvestigated: All which

actings, threatenings, and pretences of the said R. K. D. S. and J. A. are contrary to equity and good conscience, and tend to the manifest injury and oppression of your orator in the premises: In tender consideration whereof, and for as much as your orator cannot be relieved in the premises but by the aid and assistance of a court of equity, where matters of this nature are properly cognizable and relievable: AND to the END that the said R. K.—D. S. and J. A. and the rest of the confederates when discovered, may, upon their several and respective corporal oaths, full, true, and perfect answer make to all and singular the premises, to the best and utmost of their respective knowledge, information, remembrance, and belief, and that as fully and particularly as if the same were here again repeated, and they particularly interrogated thereto; and more especially that the said R. K.—D. S. and J. A. may in manner aforesaid answer and set forth, Whether such indenture of partnership, bearing such date, and to such purport and effect as hereinbefore in that behalf is set forth, or of some other and what date, and to some other and what similar purport and effect, was not executed by the said R. K. and your orator; and whether your orator and the said R. K. did not for some and what time after the execution of the said indenture, carry on the said business of upholsterers and papermen in copartnership; and whether in the course of carrying on the said business they did not purchase or take leases of the several houses hereinbefore in that behalf mentioned, or of some other and what houses; and whether the leases of the four houses last hereinbefore in that behalf mentioned did not belong exclusively to the said R. K. and whether the

said R. K. did not furnish with household goods and furniture, as well all the said first mentioned as the said four last mentioned houses, and let them out so furnished at considerably advanced rents, or how otherwise; and whether the said R. K. and your orator did not also, as partners, furnish for and on account of sundry persons several houses in London, Dublin, and elsewhere; and whether in the course of their dealings, in such their joint trade, divers persons in England and Ireland did not become indebted to them in several considerable sums of money; and whether they did not also themselves become indebted to divers persons in several sums of money; and whether they did not for some of such sums give their notes and acceptances; and whether disputes and differences did not arise between the said R. K. and your orator; and whether they did not, some time at or about the time hereinbefore in that behalf mentioned, or at some other and what time, agree to dissolve the said copartnership; and whether they did not enter into mutual bonds to each other to submit all matters in difference between them, relative to the concerns of their said copartnership, to the judgment and determination of the said D. S. and J. A. and whether such indenture of three parts, bearing such date, and to such purport and effect as hereinbefore in that behalf set forth, or of some other and what date, and to some other and what similar purport and effect, was not executed by the said R. K. your orator, and the said D. S. and J. A. and whether the said copartnership between the said R. K. and your orator was not thereby dissolved; and whether all the copartnership estate and effects of the said R. K. and your orator were not thereby conveyed to the said D. S. and J. A. on the trusts hereinbefore

in that behalf set forth, or on some other and what trusts; and whether the said D. S. and J. A. did not, soon after the execution of the said indenture, in pursuance and by virtue of the powers and authorities thereby created and vested in them, proceed in the examination of the said partnership concerns; and whether they did not dispose of all or the greater part, or some considerable part, and to what amount, of the estate and effects of the said R. K. and your orator, and whether they did not receive many or several sums of money to a very large or to some considerable and what amount in the whole, for the application of which they were liable to account to the said R. K. and your orator; and whether they did not afterwards decline proceeding to a final settlement of the said partnership concerns, and a complete execution of the said trusts; and whether they did not propose to the said R. K. and your orator to refer the further investigation of the said concerns, and execution of the said trusts, to other persons; and whether the said R. K. and your orator did not consent to such proposal, or how otherwise; and whether in consequence of such proposal and agreement, or how otherwise, such indenture of reference, bearing such date, and to such purport and effect as hereinbefore in that behalf set forth, or of some other and what date, and to some other and what purport and effect, was not executed by the said R. K. your orator, and the said D. S. and J. A. and whether the day limited therein for the arbitrators making their award in the premises was not enlarged to the said day of in the said year by indorsement on the said indenture; and whether the said R. K. and your orator did not execute to each other such bonds, bearing such date, and subject to

such conditions as hereinbefore in that behalf set forth, or some other and what bonds of some other and what date, and subject to some other and what similar conditions; and whether there be any covenant, condition, proviso, or agreement in the said indenture of reference or submission, on the part of the said D. S. and J. A. or of either of them, by which they, or either of them, could be bound to the performance of the award of the said arbitrators; and whether, if such award had been made in favour of your orator against the said D. S. and J. A. or either of them, it would not have been altogether ineffectual, or whether it could have been enforced against them, or either of them; and whether the said arbitrators did not meet a great many times at the house of the said J. H. for the purpose of examining the said accounts of the said copartnership, and the execution of the trusts vested in the said D. S. and J. A. and whether the said D. S. did not attend the said arbitrators daily or almost every day; and whether he did not dictate to them the manner in which the said accounts should be taken; and whether he did not refuse to be sworn to the truth of the disbursements charged by him to have been made on account of the said copartnership, and to produce vouchers for the same, or for some of them, and to what amount? and whether the said J. H. and J. D. did not, notwithstanding, make such award as hereinbefore in that behalf set forth, or some other and what award; and whether the said J. B. did not refuse to execute such award; and whether the said J. H. and J. D. would have made such award against your orator if they had followed the suggestions of their own minds, and had not been influenced by the said D. S. in the manner of making up

the said accounts; and whether the said J. H. and J. D. in taking the said accounts between the said R. K. and your orator, as partners, and between the said D. S. and J. A. as trustees as aforesaid, did not charge to the account of the said partnership several considerable sums, and to what amount in the whole, which ought to have been charged to the private account of the said R. K. and that they may set forth the particulars of all such sums; and whether they did not give credit to the said D. S. and J. A. or to one and which of them, and to what amount, for sums which they had never paid; and whether they did not omit to charge them, or one and which of them, with several large sums, or to some and what amount, which they or one of them had received on account of the said copartnership, for which they or one of them had given no credit to the said copartnership, and that they may set forth an account of all such sums; and whether they did not in particular make such improper charges and allowances as hereinbefore in that behalf set forth, and more particularly whether they did not allow to the said D. S. the said several sums of 500*l.* and 1000*l.* hereinbefore charged to have been received by him in manner hereinbefore in that behalf set forth; and whether the said bill of 500*l.* was not paid to the said J. C. if at all paid to him, on account of some private debt of the said R. K. and not on account of any debt due to him from the partnership of the said R. K. and your orator; and whether the said two sums of 500*l.* and 1000*l.* ought not to have been charged to the debit of the said D. S. in his account with the said copartnership, or if not, for what reason; and whether your orator hath not since the making of the

said award applied to the said R. K.—D. S. and J. A. and requested them to come to a fair and just account with your orator, and to make to your orator all fair and just allowances, and whether they have not refused so to do; and whether they do not pretend that the said award is conclusive against your orator, and that your orator is thereby barred in equity from having the said accounts opened and re-investigated? And that the said award may be set aside by a decree of this honourable court, and that the said R. K.—D. S. and J. A. may be decreed to come to a fair and just account with your orator, and that in taking such account all fair and just allowances may be made to your orator; and that the said partnership may not be debited with sums paid by the said D. S. and J. A. or either of them, on the private account of the said R. K. or that the said R. K. may be charged as indebted to the said partnership for so much; and that the said D. S. and J. A. may be charged with all such sums as they have respectively received of and from the said partnership effects; and that the said R. K.—D. S. and J. A. may be decreed respectively to pay to your orator such several sums as on taking the said account may appear to be due to him from each of them on account of the said copartnership and trusts respectively; and that, in the mean time, the said R. K. D. S. and J. A. may respectively be restrained by the order or injunction of this honourable court from all proceedings at law or otherwise for the recovery of the money so awarded to them respectively, or in any manner against your orator, touching the premises aforesaid, or any of them; and that your orator may have such other and further relief in the premises as

shall be conformable to equity and good conscience, and to your Lordship shall seem meet. May it please your Lordship, the premises considered, to grant unto your orator not only his Majesty's most gracious writ of injunction, to be directed to the said R. K.—D. S. and J. A. to restrain them and each of them from proceeding at law against your orator to enforce the performance of the said award, but also his Majesty's most gracious writ or writs of subpœna, &c.

## BILL

*To set aside an* AWARD *for Concealment of essential Circumstances by the* DEFENDANT.

To the Right Honourable William Pitt, Chancellor and Under Treasurer of his Majesty's Court of Exchequer, at Westminster, the Right Honourable Sir Archibald Macdonald, Knight, Lord Chief Baron of the same Court, and the rest of the Barons there.

HUMBLY complaining, sheweth unto your honours, your orator T. G. of, &c. that J. M. late of, &c. in the county of, &c. Esq. deceased, being seised and possessed of a considerable real and personal estate, duly made and published his last will and testament in writing, executed and attested as is by law required for the passing and charging of real estates by will, whereby he gave and bequeathed divers legacies to various persons, and particularly the sum of 1000*l.* and twenty guineas to your orator, payable out of the rents and profits of his real estates; and he directed, that in case his personal estate should be insufficient to pay his funeral expences and debts, the trustees in his will named should, by and out of the rents and profits, or by sale or mortgage of his real estate, situate in, &c. raise money sufficient to make up such deficiency; and after devising some parts of his real estates by express

name, he gave and devised all other his messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever unto the same trustees, upon trust that they should, in the first place, out of the rents and profits thereof, pay and discharge certain legacies in the said will mentioned; and from and immediately after payment of such legacies he directed that the said trustees should have, receive, and take the rents, issues, and profits thereof during the natural life of his uncle P. M. and from and after the death of the said P. M. and payment of such legacies, he directed his said trustees to convey and assure all the said messuages, lands, hereditaments, and real estates unto the first and other sons and daughters of the said P. M. and in default of such issue to J. G. one of the defendants hereinafter named; and his assigns, for and during the term of his natural life, then to trustees to preserve contingent remainders, remainder to the first and every other son of the body of the said J. G. in tail male, and in default of such issue then to and to the use of your orator and his heirs; and he appointed the several persons named in his will as trustees also his executors: And your orator sheweth unto your honours, that the said J. M. after the date and execution of his said will, made a mortgage in fee of certain premises in and by his said will devised, called therein his manor, messuages, lands, tenements, and hereditaments, in, &c. for securing the sum of 4000*l.* and afterwards intermarried with A. B. having previous to and in consideration of such his intended marriage conveyed the said manor, messuages, lands, tenements, and hereditaments in, &c. aforesaid, to certain trustees, in trust to and for the use of him the said J. M. for life, and after his decease to the use, intent, and purpose that his

said intended wife, in case she should survive him, should yearly, during her life, have, receive, and take out of the said manor, messuages, and premises in, &c. aforesaid, one clear annuity or yearly rent of 300*l.* for her jointure, and in lieu and bar of dower, and subject thereto to and for such uses as he should, by any act or deed, or by his last will and testament, in writing, direct, limit, and appoint, and in default of such appointment to the use of him the said J. M. his heirs and assigns for ever: And your orator further sheweth, that the said J. M. departed this life without issue, and without revoking or altering his said last will and testament, save only so far as the same related to the said manor, messuages, lands, and tenements in, &c. aforesaid, leaving the said J. G. his heir at law; and the said several persons, in his said will named the trustees and executors thereof, renounced the probate of the said will and declined to act in the trusts thereof; and the said J. G. thereupon possessed himself of the personal estate and effects of the said J. M. and entered into the possession and receipt of the rents and profits of the real estates devised by the said testator for the purposes in his said will mentioned; and the said J. G. hath since procured administration of the goods and chattels of the said J. M. with his said will annexed, to be granted to him by the proper ecclesiastical court: And your orator further sheweth, that by indentures of lease and release of the and days of in the year the release being made by the surviving trustees and executors named in the said will of the said J. M. of the first part, the said J. G. and your orator, T. G. and other legatees, of the second part; G. J. father of M. J. an infant legatee, of the third part;

C. F. of the fourth part; and R. G. father of your orator, of the fifth part; they the said surviving trustees and legatees, for the considerations therein mentioned, did, at the request and by the direction of the said J. G. and also the said J. G. did assign and transfer unto the said C. F. his executors, administrators, and assigns, all and singular the said several legacies bequeathed in and by the said will of the said J. M. to hold the same in trust for the said J. G. to the intent that the said legacies might be paid to the said J. G. his executors, administrators, and assigns, from and out of the said trust estates remaining chargeable with the payment thereof, at such times and in such manner as in the said will is for that purpose mentioned; and the surviving trustees did also, for the considerations aforesaid, at the request of the said J. G. and of your orator, release and convey unto the said R. G. his heirs and assigns, all and singular the messuages, lands, tenements, and hereditaments, which in and by the said will were devised to the trustees therein named, save and except the premises in, &c. to hold the same in trust for such person and persons, and for such estate and estates, and under and subject to the like uses, trusts, charges, and other incumbrances, as were declared concerning the same in and by the said will of the said J. M. or such of them as were then existing and capable of taking effect; but the said 102*l.* in the said indenture of release mentioned to have been paid to your orator, was not in truth paid to your orator, or any part thereof; and the said J. G. afterwards representing himself to be seised in fee of a certain messuage or dwelling-house situate in, &c. in the town of, &c. proposed to convey and assure the same unto your

orator and his heirs, in lieu and in satisfaction of the said sum of 102*l.* and your orator having agreed to such proposal, he the said J. G. by indentures of lease and release, bearing date the and days of in the year did convey and assure to your orator and his heirs the said messuage or tenement in, &c. in lieu and in satisfaction of the said sum of 102*l.* though he had but a life interest therein, with remainder to his issue male, remainder to your orator in fee: And your orator further sheweth unto your honours, that R. G. father of the said J. G. and of your orator, did, by certain indentures of lease and release, make chargeable certain real estates of him the said R. G. situate at, &c. in the county of, &c. with the payment of one annuity or clear yearly rent charge of 20*l.* to A. his wife, mother of your orator, for the term of her natural life, by way of jointure, and in lieu and in satisfaction of dower; and the said R. G. afterwards, and long after his intermarriage with the said A. his wife, duly made and published his last will and testament in writing executed as the law requires for the passing and charging of real estates, whereby he charged his said estates at, &c. with the payment of one annuity or yearly rent of 30*l.* to the said A. his wife for her life if she continued a widow, and after her decease or marriage, he did by his said will, or by a testamentary writing to be added thereto, give and devise his estates at, &c. to your orator and his heirs, and appointed his said wife A. and the said J. G. his eldest son, his executors, and departed this life without revoking or altering his said will, leaving the said J. G. his eldest son, his heir at law surviving him, and the said J. G. alone proved the will of the said R. G. in the

proper ecclesiastical court, and possessed himself of all and singular his personal estate, and also entered upon all his real estates; and the said A. the widow of the said R. G. in or about the year intermarried with R. H. whereby the provision made for her by the will of the said R. G. ceased and determined, and she from that time became entitled only to the annuity of 200*l.* per ann. chargeable on the said estates at, &c. and your orator became also from that time entitled to the said estates at, &c. subject to the proportion of the said annuity of 200*l.* which those estates ought to sustain: And your orator further sheweth unto your honours, that by indentures of lease and release, bearing date the and days of in the year the release being made between the said J. G. of the first part, C. F. and J. T. of the second part, and G. C. W. and several other persons therein named, being creditors of the said J. G. and also of the said J. M. and of R. G. or of some or one of them, of the third part; he the said J. G. released and conveyed to the said C. F. and J. T. all and every his messuages, lands, and tenements in reversion, remainder, or expectancy, and also all his personal estate, in trust for the payment of the debts of the said J. G. in such manner as thereby directed: And your orator further sheweth, that several disputes and differences having arisen between the said J. G. and C. F. and J. T. as his trustees, and your orator, respecting the real and personal estates of the said J. M. and the application thereof by the said J. G. and also the effect and construction of the will of the said R. G. and of the several codicils or testamentary papers found therewith, and the proportions in which the said three estates at, &c. were and are liable to

contribute towards the payment of the said annuity or yearly rent charge of 200*l.* to the said A. H. the widow of the said R. G. three several bills were filed in this honourable court between the said parties with respect thereto; and it was upon the motion of the counsel of the said C. F.—J. T. and J. G. and by the consent of your orator, ordered by this honourable court, that as well the several matters in dispute between the parties in the said causes as all other matters in dispute, claims, and demands, depending or being between the said J. G. and your orator, T. G. or the said J. G. and J. T. as the trustee of his estate and effects, and your orator T. G. in any manner or wise should be; and the same were thereby referred to S. C. C. Esq. to arbitrate, award, and determine the same: and it was further ordered, that as well the said parties as all such person or persons whose evidence might be thought necessary to be adduced or given to him, should be examined upon interrogatories, or upon oath, in such manner, and by and before such person or persons as he should direct; and that all deeds, books, and papers in the custody or power of any of the parties, relating to the matters in question, should be by them produced before him; and the said S. C. C. took upon himself the said arbitration, and he made his award in manner and form, and in the words and figures following, that is to say:—First, I find and declare, that the amount of the personal estate and effects of the said J. M. possessed or received by the said J. G. did not exceed in the whole the sum of 2800*l.*—and I find and declare, that the funeral expences and debts of the said J. M. which were paid and satisfied by the said J. G. or the said R. G. on his account, or the said C. F. and J. T. as his

trustees, (including the sum of 4000*l.* secured by mortgage of the Little Bolton Estate as aforesaid, amounted together to the principal sum of 8555*l.* together with an arrear of interest thereon, the particulars of which payments I have set forth in the schedule annexed to this my award; and I find that the annual rents of the messuages, lands, tenements, and hereditaments in Great Bolton, not specifically devised by the said J. M. out of which he the said J. M. directed his said trustees to raise and make good the deficiency of his personal estate, to pay and satisfy his funeral expences and debts, did not exceed the sum of 126*l.* And that the whole inheritance of the said premises in Great Bolton were not at the time of the death of the said J. M. worth to be sold, sufficient to make good such deficiency of the personal estate: And I do therefore declare and award, that the said J. G. and the said J. T. as his trustees, (the said C. F. having departed this life), by the means aforesaid, and as standing in the place of such creditors of the said J. M. and by virtue of the said indentures of the and days of became and now are absolutely intitled to the whole beneficial interest in the said Great Bolton Estate; and I further declare and award, that the said devise in the will of the said J. M. of the manor or lordship of Little Bolton, and the advowson and right of presentation to Little Bolton Chapel and all his the testator's messuages, lands, tenements, tithes, and hereditaments in Little Bolton aforesaid, was revoked by the said indenture of settlement of the and days of hereinbefore set forth:[1] And I

[1] Vid. the plea; post.

## BILL

*To set aside an* AWARD *for Concealment of essential Circumstances by the* DEFENDANT.

To the Right Honourable William Pitt, Chancellor and Under Treasurer of his Majesty's Court of Exchequer, at Westminster, the Right Honourable Sir Archibald Macdonald, Knight, Lord Chief Baron of the same Court, and the rest of the Barons there.

HUMBLY complaining, sheweth unto your honours, your orator T. G. of, &c. that J. M. late of, &c. in the county of, &c. Esq. deceased, being seised and possessed of a considerable real and personal estate, duly made and published his last will and testament in writing, executed and attested as is by law required for the passing and charging of real estates by will, whereby he gave and bequeathed divers legacies to various persons, and particularly the sum of 1000*l.* and twenty guineas to your orator, payable out of the rents and profits of his real estates; and he directed, that in case his personal estate should be insufficient to pay his funeral expences and debts, the trustees in his will named should, by and out of the rents and profits, or by sale or mortgage of his real estate, situate in, &c. raise money sufficient to make up such deficiency; and after devising some parts of his real estates by express

name, he gave and devised all other his messuages, lands, tenements, hereditaments, and real estates whatsoever and wheresoever unto the same trustees, upon trust that they should, in the first place, out of the rents and profits thereof, pay and discharge certain legacies in the said will mentioned; and from and immediately after payment of such legacies he directed that the said trustees should have, receive, and take the rents, issues, and profits thereof during the natural life of his uncle P. M. and from and after the death of the said P. M. and payment of such legacies, he directed his said trustees to convey and assure all the said messuages, lands, hereditaments, and real estates unto the first and other sons and daughters of the said P. M. and in default of such issue to J. G. one of the defendants hereinafter named; and his assigns, for and during the term of his natural life, then to trustees to preserve contingent remainders, remainder to the first and every other son of the body of the said J. G. in tail male, and in default of such issue then to and to the use of your orator and his heirs; and he appointed the several persons named in his will as trustees also his executors: And your orator sheweth unto your honours, that the said J. M. after the date and execution of his said will, made a mortgage in fee of certain premises in and by his said will devised, called therein his manor, messuages, lands, tenements, and hereditaments, in, &c. for securing the sum of 4000*l.* and afterwards intermarried with A. B. having previous to and in consideration of such his intended marriage conveyed the said manor, messuages, lands, tenements, and hereditaments in, &c. aforesaid, to certain trustees, in trust to and for the use of him the said J. M. for life, and after his decease to the use, intent, and purpose that his

for the sum of 6300*l.* to be paid on or before the day of then next: And by such agreement it was provided that the venders should have the rents and profits of the said Ardwich Estate up to the day of then next, at which time the said H. A. was to enter into the receipts thereof: And I find that such purchase hath been since completed, but that the rents and profits of the said two closes, let to the said J. H. have been received from that time to Christmas by the said T. G. And I find that the proportion of the said sum of 6300*l.* which was agreed to be paid for the Ardwich Estate, was the sum of 4200*l.* And I find and award that the proportion in which the said Prestwich, Ardwich, and Rusholme estates were liable to contribute to the annual payment of the jointure of the said A. H. from the time of the second marriage, were as follows, (that is to say), Prestwich, 126*l.* 18*s.* 8*d.* Ardwich, 41*l.* 7*s.* 8*d.* and Rusholme, 31*l.* 13*s.* 8*d.* making together 200*l.* And I find that all accounts in respect of the contribution of the Rusholme Estate to the said jointure, have been settled between the said parties up to Christmas from which time the whole of the said jointure hath been paid to the said A. H. up to the day of now last past, by the said J. G. or the said C. F. and J. T. as his trustees; and upon consideration of the matters aforesaid, I do declare, that the said J. G. and the said J. T. as his trustees, ought to pay to the said T. G. the sum of 560*l.* the amount of the rents of the Ardwich Estate received by the said J. G. or his trustee as aforesaid, deducting thereout the sum of 331*l.* 1*s.* 4*d.* the amount of the proportion contributable by the Ardwich Estate, to the said jointure, at the rate hereinbefore mentioned,

which reduces the said sum of 560*l.* to the sum of 228*l.* 18*s.* 8*d.* And I do further declare, that the said J. G. and J. T. as his trustees, ought to pay to the said T. G. the sum of 4200*l.* (for which the said Ardwich Estate was sold as aforesaid), with interest for the same at the rate of 4*l.* per cent. per annum, from the day of to the time when the same shall be paid, deducting thereout the sum of 289*l.* 13*s.* 8*d.* the amount of the proportion contributable by the said Ardwich Estate to the said jointure, from the said day of to the day of and also the sum of 237*l.* 12*s.* 6*d.* the amount of the proportion contributable by the said Rusholme Estate to the said jointure from Christmas to the same time; and also the sum of 50*l.* 8*s.* the amount of the rents of the said two closes let to the said J. H. which have been received by the said T. G. since the sale of the Ardwich Estate; and also the sum of 110*l.* 18*s.* being the amounts of certain parts of the said effects of the said R. G. possessed by the said T. G. and sold by him, to which it now appears he had no title: And I award that the said sum of 4200*l.* with such interest as aforesaid, shall be accepted and taken by the said T. G. in full satisfaction of all claims or demands of him the said T. G. in respect of the said Ardwich Estate; and with respect to the costs of the several suits hereinbefore mentioned, I am of opinion that the said J. G. and the said J. T. as his trustees, ought to pay to the said T. G. his costs of the suit instituted by the said C. F.—J. T. and J. G. for carrying the trusts of the said J. M.'s will into execution as aforesaid, to be taxed by the proper officer of the said Court of Exchequer, but that the said parties respectively ought to

bear their own costs of all other suits depending between them at the time of the said order of reference: And I do award and direct, that the said J. G. and the said J. T. out of the estate and effects of the said J. G. conveyed and assigned to the said C. F. and him the said J. T. as aforesaid, do, on or before the day of next, pay to the said T. G. or some person by him thereunto lawfully authorized, such several principal sums, with interest and costs, as hereinbefore particularly mentioned, after making such further deductions as aforesaid: And I do further award, that upon payment of such money, he the said T. G. shall, (if he shall be thereunto required by the said J. T.), execute good and sufficient releases, conveyances, and other assurances of all his estate, right, title, and interest in or to the several messuages, lands, tenements, and hereditaments in, &c. hereinbefore mentioned, to them the said J. G. and J. T. or either of them, or to such other person or persons as they the said J. G. and J. T. shall direct and appoint: And I do further award and direct, that they the said parties respectively shall, upon or at any time after payment of the money hereinbefore directed to be paid, when they shall be thereunto required, and at their own respective charges, make, execute, and deliver to each other sufficient mutual releases in writing of all actions, covenants, suits, and demands, which they the said J. G. and J. T. as his trustees, and the said T. G. had or claimed to have against each other in respect of the matters in difference between them at the time of making the said order of reference, as by the said award, reference being thereunto had, will appear: And your orator sheweth, that the said J. G. who, as

heir at law of the said R. G. had become entitled to and had entered upon the estates of the said R. G. situate at, &c. aforesaid, or any one on his behalf, has not settled with your orator as to the proportion which the estate at, &c. ought to have contributed towards the payment of the said annuity or yearly rent of 200*l.* to A. the wife of the said R. H. even in the proportion set thereon by the said arbitrator himself; and your orator hath since the award discovered that the said J. G. and J. T. or either of them, did not bring into account before the said arbitrators divers premises which were part of the estates at, &c. and particularly a tenement formerly let to S. H. deceased, and now in the occupation of the widow of the said S. H. at the yearly rent of 60*l.* another let to I. T. at the yearly rent of 20*l.* another let to W. B. at the yearly rent of 8*l.* 8*s.* a tenement let to R. B. at the yearly rent of 1*l.* 10*s.* a tenement let to S. C. at the yearly rent of 1*l.* 10*s.* a tenement let to C. M. at the yearly rent of 7*l.* a tenement let to S. T. at the yearly rent of 5*l.* a tenement let to the widow B. at the yearly rent of 4*l.* 4*s.* and another tenement, formerly Wilson's, late Anderson's, let at the yearly rent of 40*l.* whereby your orator is extremely injured by the said award as to the proportions which the said Ardwich and Rusholme estates should contribute to the payment of the said annuity to the said A. H.—And your orator hath also, since the making of the said award, discovered that the said J. G.—C. F. and J. T. or either of them, did not bring into account before the said arbitrators divers real estates of which the said J. M. was, at the time of his death, seised, possessed, or intitled unto, that were comprised under the general devise of all other his messuages, lands,

tenements, and hereditaments, and particularly of a messuage situate in the town of, &c. in a street called, &c. which was sold by the said J. G. or by some person in trust for him, for a large sum of money, to some committee or committees, to enlarge the said street, by the authority of Parliament; and also a messuage in or near a street called, &c. in the town of, &c. formerly let on lease to one ——W. and which hath some time since been sold by the defendant J. G. to W. T. of, &c. in the county of, &c. who now is the attorney or solicitor of the said J. G. and J. T. and also of divers small tenements adjoining to or near a certain estate of the said J. M. called the, &c. in the town of, &c. and also other estates and premises situate in or near a place called, &c. in the county of, &c. of considerable yearly value; and also other divers premises situate in the town of, &c, besides the said messuages hereinbefore mentioned, of the yearly value of 83*l.* and upwards; and also certain ground rents issuing out of other premises in the town of, &c. of the yearly value of 5*l.* 2*s.* and also a tenement now or lately in the tenure or occupation of J. S.—And your orator sheweth unto your honours, that he hath also, since the making of the said award, discovered that the said J. G. and J. T. or one of them, received of the rents and profits of the said Rusholme estate, from Christmas to Christmas the sum of 85*l.* 14*s.* 8*d.* over and above the proportion which the said estate ought to contribute towards the payment of the said annuity or yearly rent charge of 200*l.* to the said A. H. even according to the proportion set thereon by the said award: And your orator, upon having made a discovery of the several matters aforesaid, applied to the said J. G. and

J. T. and each of them, the said C. F. having departed this life before the making of the said award, and requested them to come to an account with your orator for the monies, rents, and profits by them or one of them, or by the said C. F. in his life time, received in respect of the said estates, concealed by them from the said arbitrator, in order that the same might be settled and adjusted between them upon the principle adopted by the said arbitrator in the said award, without suit, and to pay your orator the said sum of 85*l.* 14*s.* 8*d.* received by them or one of them as the rents and profits of the Rusholme Estate, over and above the proportion which the said Rusholme Estate ought to have contributed towards the said annuity or yearly rent charge of 200*l.* to the said A. H. and to convey and assure all such real estates of the said J. M. to the uses directed in that respect in and by the said last mentioned will and testament of the said J. M. and your orator well hoped they would have complied with such reasonable requests, as in justice and equity they ought to have done: BUT NOW SO IT IS, may it please your honours, that the said J. G. and J. T. combining and confederating themselves to and with divers persons at present unknown to your orator, whose names when discovered he prays he may be at liberty to insert in his bill of complaint, with apt words and matter to charge them and each of them parties defendants hereto, and contriving how to injure your orator in the premises, have not only absolutely refused to comply with your orator's reasonable requests, but are very pressing upon your orator to execute a general release to them pursuant to the said award, and threaten to compel your orator to execute the same to them, by

some application to this honourable court, or by some other proceeding at law, and to give colour thereto, they give out and pretend that they did lay before the said arbitrator a true and just account of all the particulars of the estates of the said R. G. at, &c. and the true yearly values thereof, and that they had settled with your orator in respect to the proportion which the said estate at, &c. was to have contributed towards the payment of the said annuity of 200*l.* to Mrs. A. H. up to Christmas Whereas your orator expressly charges that they did not give in a true account of the particulars of the estates of the said R. G. at, &c. to the said arbitrator, but they wilfully concealed the particulars hereinbefore mentioned, besides divers other particulars; and your orator expressly charges that the said confederates, or either of them, had not, nor had any other person settled with your orator for the sum of money which had been paid by the said estate at, &c. towards the annuity of 200*l.* to Mrs. A. H. over and above its proportion up to Christmas or to any other period, at the time of the making of the said award, or at any time since; for your orator, upon his discovering the same some time after the making of the said award, made the same known to the said confederates, or to some or one of them, and they then acknowledged the sum of 85*l.* 14*s.* 8*d.* to have been overpaid by your orator in respect thereof, and the said W. T. as the agent of the said J. G. and J. T. promised that the same should be repaid to your orator; and the said confederates also pretend that they did lay before the said arbitrator a true and just account of the real estate of which the said J. M. was at the time of his death seised, possessed, interested in, or intitled

to, and which were comprised under the general devise of all other his messuages, lands, tenements, and hereditaments; and particularly that the said messuage in, &c. was claimed by your orator, and brought before the said arbitrator, and that the said arbitrator disallowed the same; whereas your orator admits that he did claim the said messuage in, &c. before the said arbitrator, and that the defendants alleged the same to have been the property of the said R. G. and of the said J. M. and they did then shew before the said arbitrator that the said R. G. had a tenement in, &c. and which was then presumed to have been the premises so claimed by your orator; whereas your orator charges that he hath since discovered that the said messuage so claimed by him was formerly the property of P. M. who by some deed of trust conveyed and assured the same to J. M. brother of the said P. M. who granted a lease thereof to one T. R. for some term of years, and to which premises, upon the death of the said J. M. the said J. M. became intitled as his heir at law, and which premises had been originally devised to P. M. by his father J. M. which said deed of trust from the said P. M. to J. M. and the counterpart of the lease thereof from the said J. M. to T. R. and also the last will and testament of the said J. M. father of P. M. are now in the possession or power of the said confederates, or of some or one of them, whereby it will appear that the said messuage was part of the real estate of the said J. M. and which passed under the general devise in the said will, and was no part of the estate of the said R. G.— And your orator charges, that he hath, since the making of the said award, discovered that the said R.

G. had a tenement in, &c. which was, as aforesaid, presumed to be the premises so claimed by your orator, and that the tenement which so belonged to the said R. G. was called or known by the name of, &c. and was a different and distinct tenement from the messuage so claimed by your orator; and also a messuage, situate in or near a street called, &c. in the town of, &c. which was formerly the property of the said J. M. the hereinbefore named father of the said J. M. and by him demised to one — W. for a term of years, and which the said J. M. became intitled to as the heir at law of the said J. M. and which had also been originally devised to the said P. M. by his father J. M. and which said messuage, or some rent issuing thereout, was sold by the said confederates, or some or one of them, or by some person in trust for them or on their account, to Mr. W. T. who now acts as the attorney or solicitor of the said confederates, or of some or one of them; and the said defendants will sometimes admit, that the said messuage in or near a street called, &c. was formerly the property of the said J. M. but then they pretend that the same was specifically devised by the said J. M. to one C. W. chargeable with the payment of 400*l.* to S. R. and that the said R. G. purchased the same of the said C. W. whereas your orator charges that the premises devised by the said J. M. to the said C. W. were premises which had been purchased by him the said J. M. of T. T. father of the defendant J. T. and sold again by him the said J. M. after the making his said will, unto the said T. T. and that the defendant J. T. or some person claiming under his said father, now is interested therein, and that the same are different and other premises than those here claimed

by your orator: And your orator expressly charges, that the defendant J. G. did not purchase the same of the said C. W. but became intitled thereto, and possessed himself thereof, under and by virtue of the said general devise in the said will of the said J. M. and afterwards sold the same to the said W. T. and also two small tenements or cottages, situated near, &c. which the said J. M. became intitled to as heir at law of his father J. M. brother to the said P. M. which said two several tenements were purchased by P. M. from one R. T. late of, &c. in the county of, &c. and conveyed by the said deed of trust, made by the said P. M. to J. M. father of the said J. M. and also several other tenements and premises, situate at, &c. in the county of, &c. and elsewhere, to all which said several premises your orator is intitled, in fee-simple, upon the death of the said J. G. without issue male; and the said J. G. now is of the age of 47 years, and hath no issue whatsoever: And your orator expressly charges, that the several premises hereinbefore mentioned were part of the estates of the said J. M. which passed under the said general devise in his said will, and that no part thereof was the property of the said R. G. and that it will so appear by the said deed of trust from the said P. M. to the said J. M. and by an attendant lease therewith, and by the last will and testament of the said J. M. father of the said P. M. and by a certain deed made and executed by E. M. the widow of the said J. M. the elder, bearing date sometime in the year

whereby she gave certain benefits therein mentioned to one T. M. and by the counterparts of certain leases to T. R. and — W. when produced to this honourable court: And your orator charges, that it ap-

pears by a rental of the estates late of the said J. M. delivered to the said defendants, or one of them, by T. D. the receiver thereof, that there were, in the year divers tenements in the town of, &c. the property of the late J. M. of the yearly value of 84*l.* 2*s.* 8*d.* and also ground of the yearly value of 5*l.* 2*s.* and a tenement in the tenure of J. S. for which he the said T. D. accounted to the said J. G. no part whereof was brought before the said arbitrator, all which several deeds and wills, together with the said rental, and divers other deeds, wills, papers, and writings, your orator charges now are, or lately were, in the custody or power of the said confederates, or some or one of them, whereby it will manifestly appear that the several premises hereinbefore mentioned to have been omitted by the said confederates, were part of the real estate of the said J. M. and they set up many other pretences equally groundless and unjust, all which, &c.

## PRAYER OF THE BILL.

THAT they may set forth the dates, parties names, and short and material contents of all and every of such deed and deeds, will and wills, and other writings, and may deposit the same in the hands of their clerk in court in this cause; and that plaintiff, and those concerned for him, may be at liberty to inspect the same, and take copies of, or extracts from them, as he may be advised to be material and necessary for

him; and that the said confederates may set forth whether the said J. M. was not at his death seised, possessed of, or interested in, or entitled to, divers premises, or some and which premises in particular, and in whose tenure or occupation, and of what yearly value, situate near a place near, &c. in the county of, &c. which they also omitted to insert in the account of the real estate of the said J. M. laid by them before the said arbitrator, or whether the account thereof, laid before the said arbitrator by them, then was and now is, to the best of their knowledge, information, or belief, a true and just account, and in no respect erroneous; and if the said confederates shall now pretend that the said several premises before-mentioned, and charged to have been part of the estate of the said J. M. or any or either of them, were, or was in fact, part of the real estate of the said R. G. then, and in that case, that they may set forth how, and in what manner, and by what deed or deeds, will or wills, or other instrument or instruments in the law, the said R. G. became intitled to the same, or any of them respectively; and that they may set forth the date or dates of all and every of such deed or deeds, will or wills, or other instrument or instruments in the law, and parties names, and short and material contents thereof, and may deposit the same in the hands of their clerk in court in this cause; and that the plaintiff, and those concerned for him, may be at liberty to inspect the same, and take copies of, or extracts from them, as he may be advised; and whether the plaintiff hath not made the application and requests before-mentioned to the said confederates, or to one, and which, of them; and whether they have not refused to comply there-

with; and whether they have not set up the several pretences before in that behalf mentioned, or some, and which, of them, or some other, and what, pretences; and that the said confederates, and each of them, may fully answer all and singular the matters and things before charged; *and that the said award of the said S. C. C. so far as the same declares that the real estate of the said J. M. which passed by the words of the residuary clause in the will of the said J. M. consisted only of such parts of the Great Bolton Estates as were not before specifically devised, and the said house in Smithy-Door, which was conveyed by the said J. G. to the plaintiff, may be set aside, and declared not to be binding on the plaintiff; and also so far as the same declares and ascertains the proportions in which the estates, late of the said R. G. at, &c. ought to have contributed towards the payment of the said annuity of* 200*l. to the said A. H.*—and also so far as the same declares that the plaintiff had settled with the said J. G. or any other person, up to Christmas with respect to the proportion in which the Rusholme Estate ought to have contributed towards payment of the said annuity of 200*l.* to the said A. H. the said award in the several particulars above mentioned, having been occasioned by concealment of the said confederates as to the several matters before charged; and that the said confederates may set forth fully and particularly all and every part of the real estate which the said J. M. was at his death seised, possessed of, interested in, or entitled unto, which were not specifically devised by the said will of the said J. M. save and except the Little Bolton Estate, and the true yearly values thereof, and of every part thereof; and that it may be referred to the Deputy Remembrancer of the

Court to ascertain the interest of the plaintiff therein and thereto, and that the said confederates may convey and assure all such real estates to the uses directed in and by the said will of the said J. M. and that all proper parties may join in such conveyance and assurance, and that the said confederates may also set forth *a full and true account of the real estate of the said R. G. situate at, &c. and the particulars whereof the same consisted, and the yearly values thereof, and also a true and just account of what they or either of them, or any one in trust for them or either of them, or on their or either of their accounts, have or hath received out of or in respect of the said estate at, &c.* towards the payment of the said annuity of 200*l.* to the said A. H. and that it may be referred to the Deputy Remembrancer of the Court to fix and ascertain the proportion in which the said several estates at, &c. ought to have contributed, and ought now to contribute towards the payment of the said annuity of 200*l.* to the said A. H. and also to take an account of what the said confederates or either of them, or any one in trust for them, or on their or either of their account, have or hath received out of or in respect of the said Rusholme Estate, towards the payment of the said annuity of 200*l.* to the said A. H. over and above the proportion he shall ascertain which the said estate at, &c. ought to have contributed towards the said annuity; and that the said confederates or one of them may be decreed forthwith to repay unto the plaintiff what shall appear to be so over-paid, and that the said confederates may in the mean time be restrained by the order of the court from proceeding upon the said award against the plaintiff.—And for relief, &c.

## PLEA

*Of the Defendant* J. G. *sworn day of*

SAITH, that by a certain deed-poll dated day of under the hand and seal of and duly executed by S. C. C. of, &c. Esq. reciting that J. M. late of, &c. in the county of, &c. Esq. by his last will and testament in writing bearing date the day of after devising several real estates, and bequeathing several legacies in manner therein mentioned, gave the following legacies, (that is to say), To W. D.—W. B.—H. F. C. W.—W. S. and W. H. the sum of 50*l.* each; to the defendant and the plaintiff, and A. G. children of the testator's kinsman R. G. 1000*l.* a piece, and 20 guineas a piece for mourning rings; unto S. J. and M. J. the daughters of G. J. of, &c. 600*l.* a piece; and unto each and every of the children of W. W. and J. his wife 100*l.* all which said legacies or sums of money the said testator thereby ordered and directed to be paid by and out of the rents and profits of his estates therein after mentioned, and in such manner as therein after mentioned; and as for and concerning all that the said testator's manor or lordship of Little Bolton, with the appurtenances, in the county of, &c. and the perpetual advowson of Little Bolton Chapel, and all his messuages, lands, tenements, rents, tithes, and hereditaments, arising and being in Little Bolton aforesaid, and all other his the said testator's lands, tenements, hereditaments, and real estate whatsoever and wheresoever.

he gave and devised the same to the said W. D.—W. B. H. F.—C. W.—W. S. and W. H. and their heirs and assigns, for ever, UPON TRUST that they the said trustees and their heirs should in the first place out of the rents and profits thereof pay a certain annuity in the said will mentioned, and subject to such annuity said testator ordered and directed his said trustees and their heirs to pay and apply the residue of the rents and profits thereof, from time to time, as the same should be got in and received, in the payment of the several legacies therein before by him given to them the said trustees, the defendant, the plaintiff, and A. G. the said S. and M. J. and the children of the said W. and M. W. in manner therein mentioned; and after payment of the said several legacies, the said testator directed that his trustees and their heirs should receive and take the rents and profits of the said manor and premises to their own use during the life of the said testator's uncle P. M. and after the death of the said P. M. and payment of all the before-mentioned legacies, the said testator directed his said trustees and their heirs to convey all the said manors, messuages, lands, tenements, and real estate, unto the first and other sons and the daughters of the said P. M. who should be capable of purchasing and holding lands of inheritance in England, in manner therein mentioned; and for default of such issue of the said P. M. then to and to the use of the defendant for life, he taking upon himself and using the name of M. remainder to trustees to preserve contingent remainders, remainder to the first and every other son of the body of the defendant, (taking upon them and using the name of M.) in tail-male; and in default of such issue, then to and to the

use of the said plaintiff and his heirs, he and they taking upon them and using the name of M. and the said testator (after bequeathing some further legacies) gave all the residue of his personal estate, after payment of his debts and funeral expences, to his said trustees, to dispose of as they should think proper; but in case his personal estate should fall short of paying and satisfying his funeral expences and debts, then the said testator directed his said trustees and their heirs, by and out of the rents and profits, or by sale or mortgage of any part of his messuages, lands, tenements, and hereditaments in, &c. aforesaid, and not by him before particularly mentioned, to raise money sufficient to make good such deficiency, and the said J. M. appointed the said W. D.—W. B.—H. F.—C. W. W. S. and W. H. executors of his said will, and further reciting that the said J. M. after the date and execution of the said will, made a mortgage in fee of the said Little Bolton Estate, for securing the sum of 4000*l.* and further reciting certain indentures of lease and release, dated the and days of being a settlement made previous to and in consideration of a marriage which was intended to be, and was soon afterwards had and solemnized between the said J. M. and A. B. and further reciting that the said J. M. died on or about the day of without having had any issue, leaving the said A. his widow him surviving; and further reciting that the said W. D.—W. B.—H. F. C. W.—W. S. and W. H. renounced the probate of the said will, and declined to act in the trusts thereof, and thereupon the defendant possessed himself of the personal estate and effects of the said J. M. or so much thereof as he was able, and entered into possession and

receipt of the rents and profits of the real estates devised by the said testator to his trustees for the purposes before-mentioned, and the defendant had since obtained letters of administration of the personal estate and effects of the said J. M. with his said will annexed; and further reciting that by indentures of lease and release, dated the and days of the release made between the said W. B.—H. F.—C. W. and W. H. being the surviving trustees under the said will, of the first part, defendant, plaintiff, J. T. another defendant to plaintiff's bill, and A. his wife (late A. G.) —— E.—J. H. and E. H. who were the assignees of the estate and effects of the said H. F. under a commission of bankrupt, N. S. the executor of the said W. S.—W. W.—S. W.—J. W. and C. W. of Jamaica, the four sons and only children of the said W. W. and J. his wife living at the time of the death of the said J. M. of the second part, G. J. Esq. the father of M. J. one of the legatees, who was then an infant, under the age of twenty-one years, of the third part, C. F. of the fourth part, and the said R. G. of the fifth part: It was witnessed, that the said W. B. in consideration of the sum of 50*l.* the said —— E.—J. H. and E. H. as assignees of the estate and effects of the said H. F. in consideration of the like sum of 50*l.* the said C. W. in consideration of the like sum of 50*l.* the said N. S. as executor of the said W. S. in consideration of the like sum of 50*l.* the said W. H. in consideration of the like sum of 50*l.* the plaintiff, in consideration of 1021*l.* the said J. T. and A. his wife, in consideration of the sum of 1021*l.* the said W. W.—S. W.—J. W. and C. W. in consideration of 100*l.* paid to them respectively by the defendant, did, at the request and by the

direction and appointment of the defendant, and also the defendant did assign and transfer unto the said C. F. his executors, &c. all and singular the said legacies, to hold the same in trust for the defendant, to the intent that the said legacies might be paid to the defendant, his executors, &c. from and out of the said trust estates remaining chargeable with the payment thereof, and at such times and in such manner as in the said will is for that purpose mentioned; and for the consideration aforesaid, the surviving devisees in trust, at the request of the defendant and plaintiff, did release and convey to the said R. G. his heirs and assigns, all and singular the messuages, lands, tenements, and hereditaments, which in and by the said will were devised unto the trustees therein named, save and except the manor of Little Bolton, and the messuages, lands, tenements, and hereditaments comprized in the aforesaid marriage settlement, whereby the devise thereof was revoked: To hold the same to the said R. G. his heirs and assigns, upon the trusts declared concerning the same, in and by the said will of the said J. M. or such of them as were then existing or capable of taking effect; and the said G. J. in consideration of the said legacy bequeathed to his said daughter, who was then an infant, being paid to him, did thereby covenant, that he would stand and be possessed of the same for her benefit, and indemnify the defendant and the said devisees in trust for the payment thereof; and further reciting that the sum of 1021*l.* in the said indenture mentioned to have been paid to the said plaintiff, was not, nor was any part thereof in fact paid to him, but by indentures of lease and release, dated the and days of and made between the defendant of the one part,

and the said plaintiff of the other part, in consideration of 1000*l.* in the said indenture of release of the day of mentioned to have been paid to the said plaintiff, the defendant bargained, sold, aliened, and confirmed to the said plaintiff, his heirs and assigns, a certain messuage or dwelling-house situate in, &c. therein particularly described, to hold the same to the said plaintiff, his heirs and assigns, for ever; and he the defendant did thereby covenant with the said plaintiff, that he the defendant had an absolute estate of inheritance in fee-simple in the said messuage and premises, and had good right and authority to convey the same to the said plaintiff, his heirs and assigns, in manner aforesaid; and further reciting that the said plaintiff thereupon entered into the receipt of the rents and profits of the said house in, &c. and had ever since continued in the receipt thereof; and further reciting that the said J. M. was at the time of his death indebted on mortgage and other specialty, and by simple contract, to a very large amount, which debts have been since paid by such persons, and in such manner as therein after mentioned; and further reciting that the said R. G. (the late father of the defendant and the said plaintiff,) duly made and published his last will and testament in writing, (and which was attested so as to pass freehold estate), part of which was in the words or to the effect following, (that is to say): "I also "give to my son T. G. twenty shares in the Navigation "of the Rivers Mersey and Irwell; and after my wife's "death, or in case she marries, I give to my son T. "my lands in, &c. my house in, &c. and all the fur-"niture, with all the plate, linen, and china, except "what is found to the contrary on a paper, and laid

" with this; also I give to Mr. E. W. during my wife's " life, if she remains unmarried, my lands at, &c. " occupied by E. S. my lands at, &c. occupied by " T. Y. and lands in the parish of, &c. known by the " name of Fleams, occupied by J. T. in the county of, " &c. in trust, nevertheless, that he receive the rents, " and pay quarterly after the rate of 300*l.* each year to " my said wife, if she remains unmarried, and what " remains in his hands, after paying the above sum, " to divide the balance betwixt my two sons J. and T. " I also will that she has a thousand pounds paid to " her as mentioned in her settlement; I likewise give " her the carriage and the two bay horses; I likewise " give her the produce of the field at, &c. I likewise " give her my house in, &c. which we now inhabit, " and all the furniture, with the plate, linen, and china, " with the stable and warehouse thereto adjoining; " but in case she marries, I doubt not but her own " prudence will direct her in the choice of a person " who will make her satisfaction for the loss of the " house, &c. and the said house and furniture shall be " directly delivered up to my son T. and the estate to " go as the settlement directs; so that if she marries " again, it is my will that the settlement which I made " at my marriage be observed, and the estates therein " mentioned as before in this will disposed of;" and in a subsequent part of the said will, the said testator devised as follows: " And the rest and residue of all " my estates real and personal I give to my son J. G. " excepting what he will find disposed of by codicils " which are lapt up with these:" and the said testator appointed his wife A. and the defendant executors of his said will; and further reciting that the said R. G.

departed this life in or about the month of and at the time of his death several codicils or testamentary papers were found together with his said will, and that the defendant alone had proved the said will of the said R. G. in the proper Ecclesiastical Court; and further reciting that by the marriage settlement, to which the will of the said R. G. refers, a rent charge of 200*l.* per ann. was provided for A. his wife by way of jointure, during her life, out of the said premises at, &c. in the said will mentioned; and further reciting certain indentures of lease and release dated the and days of whereby the defendant conveyed and assigned all his real and personal estate and effects, (except as therein mentioned), unto the said C. F. and J. T. upon trust for the payment of the debts of the defendant, in such manner as thereby directed; and further reciting that the said A. the widow of the said R. G. did, in or about the month of intermarry with R. H. whereby the provision made for her by the will of the said R. G. ceased and determined; and further reciting that several disputes and differences had arisen between the defendant and C. F. and J. T. as his trustees, and the said plaintiff, respecting the real and personal estate of the said J. M. and the application thereof by the defendant, and also respecting the effect and construction of the will of the said R. G. and of the several codicils or testamentary papers found therewith as herein before mentioned, and the proportions in which the said three estates at, &c. were and are liable to contribute towards payment of the jointure of the said A. H. and further reciting that a bill was filed in the Court of Exchequer by the said C. F. and J. T. and the defendant against the said plaintiff, stating that

the debts of the said J. M. had been paid and satisfied by the defendant and R. G. and by the said C. F. and J. T. to an amount much beyond the personal estate of the said J. M. possessed by the defendant, and praying that the trusts of the will of the said J. M. so far as the same remained unrevoked, might be carried into execution, and that an account might be taken of his personal estate and effects not specifically bequeathed, which had been possessed or received by the defendant, and also of the said J. M.'s debts and funeral expences, and the sums paid in discharge thereof by the defendant, and in case it should appear that such personal estate and effects were not sufficient for payment of the said J. M.'s debts and funeral expences, that the deficiency might be raised by sale of the Great Bolton Estate, or a sufficient part thereof; and that the said C. F. and J. T. as assignees of the defendant, might be declared to stand as creditors on the estate of the said J. M. for the amount of the debts paid by the defendant and the said R. G.—C. F. and J. T. as aforesaid, beyond the amount of the personal estate of the said J. M. possessed by the defendant, and that an account might also be taken of the legacies of the said J. M. charged upon the rents and profits of the real estates before-mentioned, and of what had been paid by the defendant in discharge of such legacies, and that the same might be raised by sale of such estates; and further reciting that in or about Easter Term . . . a bill was filed in the same court by the said plaintiff against the defendant, C. F. and J. T. to set aside the said indentures of lease and release of the and days of . as having been fraudulently obtained, and for payment of the said legacies of 1021*l.* be-

queathed to the said plaintiff by the said J. M.'s will; and further reciting that another bill was filed in the same court by the said C. F.—J. T. and the defendant, against the said plaintiff, and against J. H. respecting two closes of land part of the Ardwicke Estate therein before mentioned; and further reciting that by an order made by the said court of Exchequer in the said three causes dated the day of upon the motion of the counsel for the said C. F.—J. T. and the defendant, it was ordered by the said court, by consent of the said plaintiff then present in court, that as well the several matters in dispute between the said parties in the said three causes, as also all other matters in dispute, claims, and demands depending or being between the defendant and plaintiff, or the defendant and J. T. as the trustee of his estate and effects, and the plaintiff, in any manner or wise, should be, and the same thereby were referred to him the said S. C. C. to arbitrate and award and determine the same, so that he should make his award in writing between the said parties touching the several matters and things thereby referred to him, on or before the day of then next, which should be confirmed and made an order of the said court; and it was further ordered, that as well the said parties, as also such person or persons whose evidence might be thought necessary to be adduced or given to him, should be examined upon interrogatories, or upon oath, in such manner, and by and before such person or persons as he should direct; and that all deeds, books, and papers in the custody or power of any of the parties, relating to the matters in question, should be by them produced before him; and further reciting that he had taken upon himself the said

arbitration, and had considered the several matters in difference between the said parties at the time of making the said order, so far as the same had been laid before him; and further reciting that the time limited for making his award in the premises had been by several orders of the said court enlarged, he the said S. C. C. did make his award in the premises in the words and in manner and form following, (that is to say), first, I find and declare that the amount of the personal estate and effects of the said J. M. possessed or received by the said J. G. did not exceed in the whole the sum of 2600*l.* and I find and declare that the funeral expences and debts of the said J. M. which were paid and satisfied by the said J. G. or the said R. G. on his account, or the said C. F. and J. T. as his trustees, (including the sum of 4000*l.* secured by mortgage of the Little Bolton Estate as aforesaid), amounted together to the principal sum of 8555*l.* together with an arrear of interest thereon, the particulars of which payments I have set forth in the schedule annexed to this my award; and I find that the annual rents of the messuages, lands, tenements, and hereditaments in Great Bolton, (not specifically devised by the said J. M.) out of which he the said J. M. directed his said trustees to raise and make good the deficiency of his personal estate to pay and satisfy his funeral expences and debts, did not exceed the sum of 126*l.* that the whole inheritance of the premises in Great Bolton were not at the time of the death of the said J. M. or at the time when such funeral expences and debts of the said J. M. were paid and satisfied as aforesaid, worth to be sold sufficient to make good such deficiency of the personal estate; and I do therefore declare and award that

the said J. G. and the said J. T. as his trustee, (he the said C. F. having departed this life), by the means aforesaid, and standing in the place of such creditors of the said J. M. and by virtue of the said indentures of the and days of became and now are absolutely intitled to the whole beneficial interest in the said Great Bolton Estate; and I further declare and award that the devise in the will of the said J. M. of the manor or lordship of Little Bolton, and the advowson and right of presentation to Little Bolton Chapel, and all his the said testator's messuages, lands, tenements, tithes, and hereditaments in Little Bolton aforesaid, was revoked by the said indentures of settlement of the and days of . herein before set forth; and I further find and declare that the only real estates which passed under the words of the residuary devise in the will of the said J. M. (that is to say) "all other my messuages, lands, tenements, heredi-"taments, and real estate whatsoever and wheresoever" were such parts of the said Great Bolton Estate as were not before specifically devised, and the said house in, &c. which was conveyed by the said J. G. to the said T. G. by the said indentures of and days of herein before set forth; and I therefore declare and award that the said T. G. hath not any claim or interest whatsoever in the real or personal estate of the said J. M. except in the said house in, &c. which I direct and award shall be accepted and taken by the said T. G. for such estate as the said J. G. had therein at the time of the execution of the said indentures of the and days of . in full satisfaction of all claims and demands of him the said T. G. in respect of the said legacies of 1000*l.* and 21*l.* bequeathed to

him by the will of the said J. M. and as to the several matters in difference between the said parties in respect of the estates of the said R. G. and the effect of his will, and the several codicils or testamentary writings found therewith as aforesaid; I declare and award that the several lands, tenements, and hereditaments of the said R. G. situate in Rusholme aforesaid, (subject to their proportion of the jointure payable to the said A. H.) were well and sufficiently devised by the said R. G. to the said T. G. in fee-simple, from the time of the second marriage of the said A. H. and I do therefore award and direct that the said J. G. and J. T. shall, upon demand for that purpose made by the said T. G. or some person by him thereunto lawfully authorized, deliver up or cause to be delivered up to him the said T. G. or unto such other person, all the title deeds and papers and writings in the custody or power of them the said J. G. and J. T. respectively, relating to or concerning the said premises in Rusholme; and I further declare and award that the lands, tenements, and hereditaments of the said R. G. situate in *Ardwich* aforesaid, were well and sufficiently devised by the codicils or testamentary papers found with the will of the said R. G. as aforesaid, or some of them, to the said T. G. in fee-simple, and that by such devise the said T. G. upon the second marriage of the said A. H. became intitled to the said premises in fee simple, (subject only to their proportion of the said A. H.'s jointure); and I find that the said J. G. or the said C. F. and J. T. as his trustees, received the rents and profits of the said Ardwich Estate, (except the said two closes let to the said J. H. at the yearly rent of 8*l.* 8*s.* which were received by the said T. G. from the time

of the second marriage of the said A. H. until the time when the possession thereof was also delivered up to H. A. Esq. in pursuance of the agreement hereinafter mentioned, which rents and profits amounted in the whole to the sum of 560*l.* and I find that by an agreement dated the day of made between W. T. on behalf of C. F. and J. T. as such trustees as aforesaid, of the one part, and the said H. A. Esq. of the other part, the said W. T. agreed for the sale of certain messuages or dwelling-houses in, &c. and the whole of the said Ardwich Estate to the said H. A. for the sum of 6300*l.* to be paid on or before the day of then next, and by such agreement it was provided that the venders should have the rents and profits of the said Ardwick Estate up to the day of then next, at which time the said H. A. was to enter into the receipt thereof; and I find that such purchase hath been since completed, but that the rents and profits of the said two closes let to the said J. H. hath been received from that time to Christmas by the said T. G. and I find that the proportion of the said sum of 6300*l.* which was agreed to be paid for the Ardwick Estate, was the sum of 4200*l.* and I find and award that the proportions in which the said Prestwich, Ardwich, and Rusholme Estates were liable to contribute to the annual payment of the jointure of the said A. H. from the time of the second marriage, were as follows, (that is to say): Prestwich, 126*l.* 18*s.* 8*d.* Ardwick, 41*l.* 7*s.* 8*d.* Rusholme, 31*l.* 13*s.* 8*d.* making together 200*l.* and I find that all accounts in respect of the contribution of the Rusholme Estate to the said jointure have been settled between the said parties up to Christmas from which time the whole of the

said jointure hath been paid to the said A. H. up to the day of now last past, by the said J. G. or the said C. F. and J. T. as his trustees, and upon consideration of the matters aforesaid, I do declare that the said J. G. and J. T. as his trustees, ought to pay to the said T. G. the sum of 560*l.* the amount of the rents of the Ardwich Estate received by the said J. G. or his trustee as aforesaid, deducting thereout the sum of 331*l.* 1*s.* 4*d.* the amount of the proportions contributable by the Ardwich Estate to the said jointure at the rate herein before mentioned, which reduces the said sum of 560*l.* to the sum of 228*l.* 18*s.* 8*d.* and I do further declare that the said J. G. and J. T. as his trustee, ought to pay to the said T. G. the sum of 4200*l.* for which the said Ardwich Estate was sold as aforesaid, with interest for the same at the rate of 4*l.* per cent. per ann. from the day of to the time when the same shall be paid, deducting thereout the sum of 289*l.* 13*s.* 8*d.* the amount of the proportion contributable by the Ardwich Estate to the said jointure from the said day of to the day of and also the sum of 237*l.* 12*s.* 6*d.* the amount of the proportion contributable by the said Rusholme Estate to the said jointure from Christmas to the same time, and also the sum of 50*l.* 8*s.* the amount of the rents of the said J. H. which have been received by the said T. G. since the sale of the Ardwich Estate, and also the sum of 110*l.* 18*s.* being the amount of certain parts of the effects of the said R. G. possessed by the said T. G. and sold by him, to which it now appears he had no title; and I award that the said sum of 4200*l.* with such interest as aforesaid, shall be accepted and taken by the said T. G. in full satisfaction of all

claims and demands of him the said T. G. in respect of the said Ardwich Estate; and with respect to the costs of the several suits herein before mentioned, I am of opinion, that the said J. G. and J. T. his trustee ought to pay to the said T. G. his costs of the said suit instituted by the said C. F.—J. T. and J. G. for carrying the trusts of the said J. M.'s will into execution as aforesaid, to be taxed by the proper officer of the said Court of Exchequer, but that the said parties respectively ought to bear their own costs of all the said suits depending between them at the time of the said order of reference; and I do award and direct that the said J. G. and the said J. T. out of the estate and effects of the said J. G. conveyed and assigned to the said C. F. and him the said J. T. as aforesaid, do, on or before the day of next, pay to the said T. G. or some person by him thereunto lawfully authorized, such several principal sums, with such interest and costs as herein before particularly mentioned, after making such deductions as aforesaid; and I do further award that upon payment of such money, he the said T. G. shall, if he shall be thereunto required by the said J. G. and J. T. and at the charges and expences of them the said J. G. and J. T. execute good and sufficient releases, conveyances, or other assurances of all his estate, right, title, interest, in or to the several messuages, lands, tenements, and hereditaments in, &c. herein before mentioned to them the said J. G. and J. T. or either of them, or to such other person or persons as they the said J. G. and J. T. shall direct and appoint; and I do further award and direct that they the said parties respectively shall, upon or at the time after payment of the money herein before directed to

be paid, when they shall be thereunto required, and at their own respective charges, make, execute, and deliver to each other sufficient mutual releases in writing of all actions, covenants, suits, and demands, which they the said J. G. and J. T. as his trustee, and the said T. G. had or claimed to have against each other in respect of the matters in difference between them at the time of making the said order of reference; and I do further award and direct that the future payments of the said jointure of 200*l.* per annum shall be from time to time kept down and paid by the said parties respectively, in the proportions herein before mentioned; and I further award that the said parties respectively shall bear the costs of the said reference.

SAITH, that by an order of this court, made in the three several before-mentioned causes, on the day of *upon the motion of the counsel of the said plaintiff*, praying that the aforesaid award might be confirmed and made an order of this court; and on hearing the counsel for the defendant, and the said J. T. it was ordered that the said award should be, and the same was thereby made an order of this court, and that the same should be binding upon the said several parties, and that they should abide by, perform, and fulfil the said award, according to the true intent and meaning thereof, as by the said award and order, relation being thereunto had when produced, will appear, and to which the defendant for his greater certainty refers.[1]

[1] This was the case of Gartside v. Gartside, mentioned in page 378.

# BILL

*To* SET ASIDE *an* AWARD *for* CORRUPTION *and* PARTIALITY *in the* ARBITRATORS.

To the Right Honourable William Pitt, Chancellor and Under Treasurer of his Majesty's Court of Exchequer, at Westminster, Sir James Eyre, Knt. Lord Chief Baron of the same Court, and the rest of the Barons there,

HUMBLY COMPLAINING, sheweth unto your Honours your orator W. E. of, &c. in the county of, &c. grazier, (debtor and accountant to his Majesty, as by the records of this honourable court, and otherwise, doth or may appear,) that for some time previous to the month of your orator had considerable dealings and transactions, in the way of his business of a grazier, with J. H. of, &c. in the said county of, &c. and S. T. of, &c. aforesaid, in the way of their trade or business of butchers, which they then, and for some time before, had carried on in partnership together; and that in the said month of the said T. H. and S. T. as partners as aforesaid, stood indebted to your orator in the sum of 121*l.* 13*s.* 6*d.* on the balance of accounts between them; and your orator, as was admitted and allowed by them the said J. H. and S. T. upon a settlement of such accounts in

that month; and the said J. H. was also at that time, as he likewise admitted and acknowledged, justly indebted to your orator, on his own separate account, in the sum of 7*l.* 7*s.* and the said S. T. was also then indebted to your orator, on his own separate account, in the sum of 65*l.* 6*s.* and your orator having made many fruitless applications to the said J. H. and S. T. for payment of such debts, he your orator, in the said month of caused actions at law to be commenced against them for recovery of the same: And your orator further sheweth, that soon after the commencement of those actions the said S. T. made and executed an assignment of all his estate and effects to certain trustees, in trust for and for the benefit of his creditors, and that the debt originally due from the said J. H. and S. T. as partners as aforesaid to your orator, having amounted to the sum of 160*l.* 13*s.* 6*d.* one moiety whereof amounted to the sum of 80*l.* 6*s.* 9*d.* and the said J. H. having, with his own separate money, paid to your orator the sum of 39*l.* on account of such partnership debt (whereby the same was reduced to the aforesaid balance or sum of 121*l.* 13*s.* 6*d.*) and each of the said co-partners, although clearly and fully understood to be liable to your orator for the whole of the said balance, yet being liable, as between themselves, to pay a moiety of such original debt of 160*l.* 13*s.* 6*d.*—and the said J. H. having, by the said payment, reduced his moiety thereof to the sum of 41*l.* 6*s.* 9*d.* it was upon the occasion of the said S. T. making the aforesaid assignment of his estate and effects agreed between the said J. H. and your orator, that the said J. H. should forthwith pay (and he accordingly did afterwards pay and satisfy) to your orator the re-

mainder of his the said J. H.'s moiety of the said original partnership debt, together with what was so due to your orator from him the said J. H. on his own separate account as aforesaid: and it was also agreed, with the privity and approbation of the said S. T. and his creditors, or many of them, that your orator should come in as a creditor under the said S. T.'s said assignment of his estate and effects, not only for the debt so, as aforesaid, owing to him by the said S. T. on his own separate account, but also in respect to the said S. T.'s said moiety of the said original partnership debt of 160*l.* 13*s.* 6*d.* and take a dividend out of such estate and effects in respect thereof, rateably and in proportion with the said S. T.'s other creditors; and it was agreed between your orator and the said J. H. that the said J. H. should give his promissory note to your orator for the said sum of 80*l.* 6*s.* 9*d.* the said S. T.'s moiety of the said original partnership debt, as a security for so much of such moiety as should not be satisfied by means of such dividend out of the said S. T.'s estate and effects, and that your orator should discontinue any further proceedings in the said actions at law: And your orator further sheweth, that the said J. H. did accordingly, and in pursuance of such agreement, give a promissory note under his hand to your orator for payment to your orator of the said sum of 80*l.* 6*s.* 9*d.* being the amount of the said S. T.'s moiety of the said original joint debt, and which said note is now in your orator's possession; and in consideration thereof, and in pursuance of the said agreement, your orator discontinued the said actions at law, and part of your orator's costs in such actions was satisfied by the said S. T. or placed to his account, and the residue of

such costs, amounting to the sum of 3*l.* 3*s.* the said J. H. agreed and undertook to pay to your orator as his the said J. H.'s proportion or share of such costs: And your orator further sheweth, that in the month of a dividend of 9*s.* in the pound was made among the creditors of the said S. T. who took the benefit of the said assignment of his estate and effects; and your orator received the said dividend upon, or in respect of, the said sum of 80*l.* 6*s.* 9*d.* the said J. T.'s moiety of the aforesaid partnership debt, and which dividend so received by your orator amounted to the sum of 36*l.* 3*s.* and that sum being deducted from the said sum of 80*l.* 6*s.* 9*d.* reduced the same to the sum of 44*l.* 3*s.* 9*d.* and that the produce of the said S. T.'s estate and effects comprized in the said assignment being wholly exhausted by the payment of the said dividend among his creditors, and the said J. H. having given the said promissory note to your orator as a security for so much of the said sum of 80*l.* 6*s.* 9*d.* therein mentioned as should not be satisfied by means of the dividend out of the said S. T.'s estate and effects, he your orator, after the receipt of the said dividend, applied to the said J. H. for payment of the said sum of 44*l.* 3*s.* 9*d.* so remaining due on the said promissory note, after deducting the said dividend, as also for payment of the said sum of 3*l.* 3*s.* and your orator's attorney, at the request of the said J. H.'s attorney, sent to him a letter, containing the particulars of the said demands: And your orator further sheweth that the said J. H. repeatedly promised to pay to your orator the said sum of 44*l.* 3*s.* 9*d.* and also the said sum of 3*l.* 3*s.* on account of the costs of the said actions; but the said J. H. not performing such his promises

your orator at length caused another action at law to be commenced against the said J. H. in order to recover from him the said sums of 44*l.* 3*s.* 9*d.* and 3*l.* 3*s.* And your orator further sheweth, that the said last-mentioned action having been proceeded in to issue, the same stood for trial at the Lent assizes in and for the said county of, &c. in the year but previous to the said action coming on to be tried the said J. H. applied to your orator, and to his said attorney in such action, and earnestly requested that your orator would consent that the matters in difference between them, in respect whereof the said last-mentioned action had been brought, should be referred to the arbitration of J. S. of, &c. in the said county of, &c. gent. and E. M. of, &c. in the same county, gent. and your orator having consented thereto, they, your orator and the said J. H. thereupon subscribed their names to an agreement in writing, dated the day of whereby it was agreed that the said last-mentioned action, and the costs thereof, and of the said reference, as well as all other matters in dispute between your orator and the said J. H. should be referred to, and that they, your orator and the said J. H. should abide by the award and final determination of the said J. S. and E. M. provided such award should be made in writing, and ready to be delivered on or before the day of then next: And your orator further sheweth that by another agreement in writing, signed by your orator and the said J. H. dated the day of it was agreed that the time for the said arbitrators making their award should be enlarged until the day of then next, but the said arbitrators did not previous to or on that day make any award touching

the matters so referred to them, although several appointments had been made by the said arbitrators, for proceeding upon the said arbitration, and your orator and his attorney had attended at the respective times and places so appointed, and were prepared and ready to have entered upon the said reference; but although the said J. H. attended at one of the said meetings, he was unprepared to enter upon the said reference; and at the rest of the said meetings, neither the said J. H. nor any person on his behalf, did attend, although the said J. H. had due and proper notices previously given to him of such respective appointments; and your orator further sheweth that on the day of the said month of your orator and the said J. H. agreed that T. C. of, &c. aforesaid, gentleman, should be added as an arbitrator to the said E. M. and J. S. and that the award of any two of them should be binding, and that your orator and the said J. H. should execute, and they did accordingly execute bonds of arbitration to each other, dated the day of and that by the bond so executed by your orator, he became bound to the said J. H. in the penal sum of 100*l.* with a condition thereunder written, in the words and figures or to the effect following, (that is to say): "The condition of "this obligation is such, that if the above bounden "W. E. his heirs, executors, or administrators, or any "of them, on his and their parts and behalfs, shall in "all things well and truly stand to, obey, and abide "by, perform, fulfil, and keep the award, order, arbi- "trament, end, and final determination of T. C. of, &c. "in the county of, &c. gentleman, E. M. of the same "place, gentleman, and J. S. of, &c. in the said,

"county, gentleman, or of any two of them, arbitra-
" tors, indifferently elected and named, as well on the
" part and behalf of the above bounden W. E. as of
" the above named J. H. to arbitrate, award, order,
" judge, and determine of and concerning all and all
" manner of action and actions, cause and causes of
" action, suits, bills, bonds, specialties, judgments,
" ceremonies, extents, quarrels, controversies, tres-
" passes, damages, and demands whatsoever, at any
" time heretofore had, made, moved, brought, com-
" menced, sued, prosecuted, done, suffered, committed,
" or depending by and between the said parties, or
" either of them, so as the said award be made in
" writing, and ready to be delivered to the parties in
" difference, (or such of them as shall desire the same)
" on or before the day of next: Then this
" obligation to be void, or else to remain in full force."
And the bond executed by the said J. H. as aforesaid was in the same penalty, and with a condition to the same effect as the condition to the bond so executed by your orator, as by such bonds and the conditions thereof, reference being thereunto respectively had, will appear; and your orator further sheweth, that your orator being very desirous that the said arbitration should be proceeded in, and an award be made before the expiration of the time limited by the said arbitration bonds, he, your orator, and his attorney, between the said month of and the month of following, made repeated applications to the said J. H. and his attorney, and the said arbitrators named in the said bonds, to appoint a time for proceeding upon the said arbitration, but the said J. H. constantly declined appointing any time himself for that purpose; and although

the said arbitrators, or some or one of them, between the said months of and appointed or proposed different days for proceeding upon the said arbitration, and hearing the respective allegations of your orator and the said J. H. and the evidence of their respective witnesses, yet the said J. H. constantly pretended that it did not suit him, or he could not make it convenient to attend the said arbitrators on the respective days so appointed, and he did not so attend; and after your orator and his said attorney had made various ineffectual attempts to get the said arbitration proceeded in, the said E. M. at length, on the day of wrote and sent a letter of that date to your orator's attorney, Mr. J. B. advising him to write a letter to the said J. H. desiring him the said J. H. to appoint any day between the said day of and the day of following, for proceeding upon the said arbitration, and accordingly the said Mr. B. on or about the day of the said month of wrote and sent a letter to the attorney of the said J. H. of that date, desiring that he the said J. H. or his said attorney, would appoint any day between that time and the said day of for proceeding upon the said arbitration, and they were, or one of them was therein desired to appoint a day accordingly, but although such letter was received by the said J. H. or his attorney, on the same or day of or thereabouts, yet neither of them did return any answer thereto, either to your orator or his said attorney; and therefore, on the day of the said month of the said Mr. B.'s clerk applied first to the said J. H.'s attorney for an answer to the said letter, who referred him to the said J. H. and he accordingly

on that day went to the house of the said J. H. and desired him to fix on a day between that time and following for proceeding on the said arbitration according to the desire of the said Mr. M. and thereupon the said J. H. declared that he could not make it convenient to attend the said arbitrators on any day previous to or on the said the day of the said month of as proposed by the said Mr. M. and he the said J. H. at the same time declined to mention and did not mention any other day when he would or could make it convenient to attend the said arbitrators; and your orator further sheweth, that on the day of being upwards of four months after the execution of the said arbitration bonds, the said E. M. and T. C. (two of the arbitrators named in the said bonds), at the pressing solicitation of your orator and his said attorney, subscribed their names to a writing dated the said day of whereby they appointed the day of at the house of P. G. in, &c. aforesaid, to hear the evidence and allegations of the said J. H. and your orator, and otherwise to proceed on the said reference, and a copy of which said writing or notice was delivered to the said J. H. and J. S. respectively, on the day of by a messenger sent by the said E. M. and T. C. for that purpose, and the said J. S. said he would attend accordingly, and notice was on the same day given to your orator of such last mentioned appointment; and your orator further sheweth, that on the said day of the said E. M. and T. C. pursuant to their said appointment, attended at the house of the said P. G. in, &c. aforesaid, and the said two arbitrators were then and there attended by your orator and his attorney

the said Mr. B and your orator's witnesses, and they the said two arbitrators continued at the said house from the morning of the said day of until about eight or nine o'clock in the evening of that day, during which time neither the said J. H. nor any person on his behalf, attended the said arbitrators, nor did he send any message to them assigning any reason or excuse for his nonattendance, nor did the said arbitrator J. S. attend such meeting, or send or assign any reason for his nonattendance; and that about eight or nine o'clock in the evening of the said day of and not earlier than eight o'clock in that evening, the said two arbitrators E. M. and T. C. heard the testimony of the said Mr. B. touching the causes of the aforesaid action, in respect whereof the said reference had been made, and thereupon the said E. M. and T. C. declared that they were perfectly satisfied that your orator had sufficiently established his said demands upon the said J. H. for the said sum of 44*l.* 3*s.* 9*d.* in respect of the said promissory note, and for the said sum of 3*l.* 3*s.* on account of the said J. H.'s share of the costs of the said first-mentioned actions, and that no further testimony was necessary on your orator's behalf in support of such demands, although they the said E. M. and T. C. were at that time expressly told that your orator had other witnesses whom your orator meant to have examined before the said arbitrators, in case they had not so declared themselves satisfied with the said Mr. B.'s evidence, or in case the said J. H. had made any defence before the said arbitrators which might have rendered it necessary to examine such other witnesses of your orator; and the said Mr. B. did at that time observe and say to the said E. M. and T. C. that if the

said J. H. should, before they the said arbitrators should make their award, offer any evidence which they the said arbitrators might think material, he the said Mr. B. on behalf of your orator, together with your orator's other witnesses, ought to have an opportunity of being present, and of being heard as to what should be so offered by or on the behalf of the said J. H. and of answering or replying to or endeavouring to answer or reply to the same, and the said arbitrators thereupon acquiesced in the propriety thereof, and promised your orator should have such opportunity; and before the said arbitrators E. M. and T. C. left the said house, they declared and expressed to your orator and the said Mr. B. their final and absolute resolution to be that they would meet at the house of the said Mr. C. at, &c. aforesaid, on the then next day, to settle and prepare instructions for their award, which they would employ a Mr. T. an attorney to prepare forthwith accordingly, and that they would not, after the many delays and disappointments which the said J. H. had occasioned, give themselves or the parties concerned any further trouble about the business, or the said E. M. and T. C. expressed themselves to that effect: and your orator further sheweth, that from what had passed at the said meeting on the said day of your orator and his said attorney concluded that it would not be necessary for your orator or his said attorney, or your orator's witnesses, to attend the said arbitrators again on the business of the said reference, but that the said E. M. and T. C. would have made an award in your orator's favour; but, as your orator has since discovered, they the said E. M. and T. C. on Wednesday the day of the said month of met at the house

of the said E. G. and were at such meeting attended by the said J. S. and J. H. and also by his the said J. H.'s attorney, and several persons as his witnesses; and in the afternoon of the said day of the said three arbitrators E. M.—T. C. and J. S. made and executed an award in writing of that date, which being afterwards delivered to your orator, he thereupon, to his great surprise, found that after therein taking notice that they had been duly attended by the attorneys or solicitors for the said parties, and had heard and examined the allegations, witnesses, and evidence of and for the said parties, and had deliberately considered the same, they the said T. C.—E. M. and J. S. did thereby award and order that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, or depending by or between the said J. H. and your orator, in law or equity, for any manner of cause whatsoever, should cease and be no further proceeded in or prosecuted; and that the said promissory note of the said J. H. should be delivered up and cancelled, and that your orator should pay, or cause to be paid, unto the said J. H. the sum of 10*l.* 10*s.* on the day of then next, for his costs; and that on payment of the said sum of 10*l.* 10*s.* as aforesaid, as well your orator as the said J. H. should respectively make, seal, and execute, each party unto the other, mutual general releases of all actions, suits, and causes of action depending between them; and of all debts, damages, accounts, reckonings, and demands whatsoever, from the beginning of the world to the day of the dates of the said bonds, as by such award, reference being thereunto had, will appear: And your orator further sheweth, that the said meeting of the said arbitrators on the said

day of was not attended either by your orator or his said attorney, or any person on his your orator's behalf, nor was any notice, *previous to that day*, given by the said arbitrators, or any or either of them, to your orator or his said attorney that they intended to meet on that day to hear the allegations, evidence, and witnesses of or on the part of the said J. H. or respecting the said reference; and although it was and is recited in the said award that the said three arbitrators had been duly attended by the attorneys for your orator and the said J. H. and had heard and examined the allegations, witnesses, and evidence of and for both parties, and had deliberately considered the same, yet in fact the said J. S. never was attended either by your orator or his attorney upon the business of the said reference; and the said two other arbitrators, E. M. and T. C. did not hear the testimony of all your orator's witnesses respecting the matters of the said reference, although they the said E. M. and T. C. had, as hereinbefore stated, been fully apprized and informed that your orator had other witnesses and evidence to produce touching the said reference, and they ought therefore, and under the circumstances aforesaid, as your orator humbly insists, to have deferred making any award unfavourable to your orator until they had heard such other witnesses and evidence on the part of your orator; and your orator ought, as he also humbly insists, to have had reasonable notice given to him by the said arbitrators, or some or one of them, previous to the said day of of their intention to meet on that day upon the said reference, in order that your orator and his attorney and witnesses might have been prepared to attend such meeting: and

your orator expressly avers that the aforesaid award was the effect of a collusion between the said arbitrators and the said J. H. or of their partiality for him, or the same was obtained by him from them by some corrupt, undue, or unfair means, as is evident from the aforesaid improper conduct of the said arbitrators: and your orator likewise humbly insists, that under the circumstances and for the reasons aforesaid, and for that the said arbitrators so grossly misconducted themselves as aforesaid, he your orator ought not to be bound by the said award, and the rather so for that your orator's demands against the said J. H. in respect whereof the said last mentioned action was brought against him, were founded in reason and justice, and your orator was well intitled to be satisfied the same, and in fact your orator's said demand upon the said J. H. for the said sum of 3*l.* 3*s.* on account of the costs of the said first mentioned actions, never was disputed by the said J. H. and was admitted by him or on his behalf before the said arbitrators at their said last mentioned meeting to be a good and just demand, and in fact the said arbitrators did, as your orator hath since discovered, or been informed, allow such your orator's demand of 3*l.* 3*s.* on account of the costs of the said first mentioned actions, and that they deducted, or pretended to deduct the same from the said J. H.'s costs of the said last mentioned action, and therefore the said award was very unfair and unjust, and ought, as your orator humbly insists, to be set aside or declared void: and your orator further sheweth, that for the reasons aforesaid he hath refused to abide by the said award, and hath frequently since such award was made applied to the said J. H. and requested him to pay and satisfy

your orator his said demands, in respect whereof he commenced the said last mentioned action, and your orator hoped that such his requests would have been complied with, as in justice and equity the same ought to have been, and that the said J. H. would not have insisted upon your orator's performing the said award: BUT NOW SO IT IS, may it please your honours, that the said J. H. combining and confederating with divers other persons, at present unknown to your orator, whose names when discovered your orator craves leave to insert herein, with apt matter to charge them as parties defendants hereto, and contriving to injure your orator in the premises, REFUSES to comply with your orator's said request, and insists upon your orator's abiding by and performing the said award, which he contends is a just and proper award, and pretends that no undue means were made use of by him to obtain the same, and that the said arbitrators in making such award were not influenced by any improper motives, and that due and proper notice was given to your orator previous to the said , day of that the said arbitrators would meet on that day to hear the allegations and evidence of and on the part of the said J. H. or that your orator, and his said attorney had notice given to them on that day, and previous to the said award being made, that the said arbitrators were met together at, &c. aforesaid, upon the business of the said reference: WHEREAS your orator charges that the said arbitrators, or any or either of them, or any other person, did not at any time previous to the said day of give your orator or his said attorney Mr. B. any notice that the said arbitrators intended to meet on that day on the business of the said reference, or to

hear the allegations, witnesses, and evidence of and on the part of the said J. H. nor was any proper notice on that day given to your orator or the said Mr. B. that the said arbitrators had met together, or were on that day to meet together upon the business of the said reference, and to hear the allegations and evidence of and on the part of the said J. H. in case any such notice had been given to your orator and the said Mr. B. on that day (but which notice your orator expressly charges was not given), the same was not a proper notice in point of time, and it was unreasonable to desire or expect your orator and the said Mr. B. to attend, or to procure his your orator's witnesses to attend the said arbitrators at, &c. aforesaid, and in fact it was impossible for them to attend in the forenoon on that day, or indeed at any time upon so short a notice, your orator's then place of residence being at the distance of about ten miles from, &c. and the said Mr. B.'s then place of residence being at the distance of twelve miles from, &c. and the said Mr. B. having been during the morning and latter part of the said day of at, &c. in the said county of, &c. distant eighteen miles from, &c. on some important business in the way of his profession, which he could not leave, as the said arbitrators well knew, before they made and executed their said award; and although T. M. who was one of your orator's witnesses, and who resided at the distance of only about six or seven miles from, &c. upon hearing on the said day of that the said arbitrators were met together at, &c. upon the business of the said reference, did attend them there, and was asked some questions by them; yet he was not present when any other witnesses were

examined, or the said reference was proceeded upon, but he was desired to depart from the room where the arbitrators were as soon as such questions had been asked him, nor was he upon that occasion asked the proper questions, or fully or properly examined on your orator's behalf, there being no person there present on your orator's part to examine the said T. M. or put such questions to him as ought to have been put, and as would have disclosed she several material facts within his knowledge touching the matters of the said reference: And your orator further charges, that if the said arbitrators did on the day of hear any witnesses or evidence on the part of the said J. H. such evidence or the testimony of such witnesses did not warrant them in making their aforesaid award; and that the said arbitrators, in making their said award, were influenced by partiality for the said J. H. or by some undue or improper motives, and were in collusion with him, or he obtained such award by some corrupt, undue, unfair, or improper means; and at other times the said J. H. pretends that when your orator commenced the said last mentioned action, he had not any good or just demand upon him the said J. H. in respect to the said promissory note, or on account of the said partnership debt, for that as he the said J. H. pretends your orator took the said promissory note merely as a collateral security for the dividend which your orator was to receive out of the said S. T.'s estate and effects, or that when he the said J. H. satisfied your orator his the said J. H.'s moiety of the said partnership debt, your orator agreed to relinquish any claim upon him the said J. H. in respect of the said promissory note; and that when your orator commenced the said last

mentioned action, he had not any good or just demand upon him the said J. H. on account of the costs of the said first mentioned actions: WHEREAS your orator charges that the said promissory note was actually given by the said J. H. as a security for so much of the said S. T.'s moiety of the said partnership debt of 160*l.* 13*s.* 6*d.* as the dividend out of his the said S. T.'s estate and effects would not extend to pay; and your orator expressly charges that neither at the time when the said J. H. satisfied his moiety of the said partnership debt, nor at any other time, did your orator in any manner agree to abandon, give up, or relinquish the said promissory note, or his claim and demand upon the said J. H. for so much of the said S. T.'s moiety of the said partnership debt as his said dividend would not extend to pay; and your orator further charges that the said J. H. was not only bound and liable to pay to your orator so much of the costs of the said first mentioned actions as should not be satisfied by or recovered from the said S. T. but that he the said J. H. did actually promise and agree to pay to your orator the sum of 3*l.* 3*s.* on account of such costs; and your orator also charges that the said J. H. never did in any manner dispute with your orator his the said J. H.'s liability to pay and satisfy your orator such sum of 3*l.* 3*s.* on account of the aforesaid costs, but on the contrary, the said J. H. at the time he proposed the said reference to your orator, did admit and acknowledge before the said Mr. B. and several other persons, that your orator had a just demand upon him the said J. H. for such sum of 3*l.* 3*s.* on account of the said costs, and said his attorney had had directions from him to pay the same, and admitted himself then liable to the payment

thereof; and your orator charges that the said J. H. could not and did not dispute his engagements and liability to pay the said sum of 3*l.* 3*s.* and the said arbitrators therefore ought at least to have awarded the payment of such sum of 3*l.* 3*s.* to your orator, together with your orator's costs in respect of the said last mentioned action, and in respect of the said reference, as your orator upon establishing his demand for such sum of 3*l.* 3*s.* upon the trial of the said last mentioned action, would have been intitled to his costs, though he should have failed in establishing his said other demand, but nevertheless the said J. H. insists upon your orator performing the said award, and threatens and intends to proceed in some manner against your orator at law; to enforce a performance of such award; ALL which Actings, &c.

## PRAYER OF THE BILL.

And that the said J. H. may be compelled to make a full and complete answer to the several matters aforesaid, and that the said award may be decreed to be set aside and cancelled, and the said J. H. be decreed to pay to your orator the said sums of 44*l.* 3*s.* 9*d.* and 3*l.* 3*s.* in respect whereof your orator commenced the said last-mentioned action, together with your orator's costs attending such action and the said reference; and that the said J. H. may in the mean time be restrained by the order and injunction of this honourable court

from proceeding in any manner at law against your orator upon the said bond so executed by your orator as aforesaid, and upon the said award, or otherwise touching the said bond or award; and that your orator may have such further and other relief in the premises as the nature of the case may require and to your Honours shall seem meet. May it please your Honours, &c. P. J.

---

*The* PLEA *of* J. H. *Defendant, to part, and his* ANSWER *to the residue, of the* BILL *of* COMPLAINT *of* W. E. *Complainant.*

THIS defendant, by protestation not confessing or acknowledging all or any of the matters or things in the complainant's said bill alleged and set forth to be true, in such manner and form as the same are therein so set forth, to all the relief prayed by the said bill, and to so much of the said bill as seeks a discovery of the several matters and things which were the subject of the reference to the arbitration of T. C. of, &c. in the county of, &c. gentleman, E. M. of the same place, gentleman, and J. S. of, &c. in the said county, gentleman, or of any two of them, in the said bill of complaint, and hereinafter mentioned, this defendant doth plead in bar, and for plea saith, that the said complainant did, on the day of duly enter into and execute a certain bond or writing obligatory, bearing date the said day of in the

penal sum of 100*l.* payable by him the said complainant, his executors, or administrators, to this defendant, his executors, or administrators, on the day of and with a condition thereunder written in the words following; that is to say, The condition of this obligation is such, that if the above bounden W. E. his heirs, executors, or administrators, or any of them, on his and their parts and behalfs, shall and do in all things well and truly stand to, obey, and abide by, perform, fulfil, and keep the award, order, arbitrament, end, and final determination of T. C. of, &c. in the county of, &c. gentleman, E. M. of the same place, gentleman, and J. S. of, &c. in the said county, gentleman, or of any two of them, arbitrators indifferently elected and named, as well on the part and behalf of the above bounden W. E. as of the above named J. H. to arbitrate, award, order, judge, and determine of and concerning all and all manner of action and actions, cause and causes of action, suits, bills, bonds, specialties, judgments, extents, quarrels, controversies, trespasses, damages, and demands whatsoever, at any time heretofore had, made, moved, brought, commenced, sued, prosecuted, done, suffered, committed, or depending by and between the said parties or either of them, so as the said award be made in writing and ready to be delivered to the parties in difference, or such of them as shall desire the same, on or before the day of next, then this obligation to be void, or else to remain in full force, as by the said bond or writing obligatory, now in the custody of this defendant, reference, being thereunto had, may more fully appear; and this defendant for plea further saith, that this defendant did, on or about the said day of duly enter

into and execute a certain bond or writing obligatory, bearing date the said day of in the penal sum of 100*l.* payable by this defendant, his executors, or administrators, to the said complainant, his executors, or administrators, on the day of with a condition thereunder written, for making void the same, if this defendant, his executors, and administrators, should in all things well and truly stand to, obey, abide by, perform, fulfil, and keep the award, order, arbitrament, and final determination of the said T. C.—E. M. and J. S. or any two of them, being such arbitrators as hereinbefore is mentioned, so to be made as hereinbefore is mentioned, the condition of the said last mentioned bond being in the same words, with the exception only of the parties' names, as the condition of the said bond first hereinbefore mentioned, as by the said last mentioned bond, had this defendant the same to produce, reference being thereunto had, would more fully appear; and this defendant for plea further saith, that the said E. M.—T. C. and J. S. having been duly attended by the solicitors or attornies of the said complainant and this defendant, and having heard and examined the allegations, witnesses, and evidence of the said complainant and this defendant, did, on the day of duly make and execute, and deliver to the said complainant and this defendant, their award in writing of that date, and did thereby award and order that all actions, suits, quarrels, and controversies whatsoever, had, moved, arisen, or depending by or between the said parties, in law or equity, for any manner of cause whatsoever, should cease and be no further proceeded in or prosecuted; and they did also

award and order that the promissory note of this defendant, mentioned in the pleadings, should be delivered up and cancelled, and that the said complainant, his heirs, executors, or administrators, should pay or cause to be paid unto this defendant, his executors, or administrators, the sum of 10*l.* 10*s.* of lawful money of Great Britain, on the day of then next, between the hours of two and four in the afternoon, at the house of P. G. known by the name or sign of the Devonshire Arms, in, &c. aforesaid, for his costs; and they did further award and order, that on payment of the said sum of 10*l.* and 10*s.* as aforesaid, as well the said complainant as this defendant, should respectively make, seal, and execute, each party unto the other, mutual general releases of all actions, suits, and causes of action depending between them, and of all debts, damages, accounts, reckonings, and demands whatsoever, from the beginning of the world to the day of the dates of the above-mentioned bonds or obligations, as by the said award in writing, now in the custody of this defendant, ready to be produced as this honourable court shall direct, reference being thereunto had, will more fully appear: ALL which matters and things this defendant doth aver to be true, and is ready to prove the same as this honourable court shall award, and therefore he doth plead the same in bar to so much and such part of the said bill as aforesaid, and humbly prays the judgment of this honourable court, whether he shall be compelled to make any further or other answer to so much and such part of the said bill as is hereby and herein pleaded to as aforesaid; and this defendant, not waiving his said plea, but wholly relying and insisting thereon, and in aid and support thereof,

for answer to the residue of the said complainant's bill not hereinbefore pleaded unto, or to so much thereof as this defendant is advised is material or necessary for him to make answer unto, he answereth and saith, that for any thing he knows to the contrary, it may be true that the complainant was desirous that the said arbitration should be proceeded in, and an award made before the expiration of the time limited by the said bonds, but whether he was so desirous or no, this defendant doth not know, nor can he set forth, nor doth he know, nor can he set forth whether the said complainant or his attorney did, between the month of and the month of following, make any or what application or applications to the said arbitrators, or any of them, to appoint a time for proceeding upon the said arbitration, but he admits that the said complainant or his attorney, or the said T. C. or E. M. or some or one of them, did, between the said month of and the following, apply to this defendant, and inform him that a time was appointed to proceed upon the said arbitration, or request him to appoint a time for that purpose, and that a time was agreed upon or appointed for that purpose, and this defendant was ready and willing to have attended at the time so appointed, but the said other arbitrator, J. S. was taken very ill, whereby he was unable to attend at the time so appointed as aforesaid, of which this defendant gave notice to the said other arbitrators, whereupon the said intended meeting did not take place; and this defendant denies that any other application or applications was or were made by the said complainant or his attorney, or the said arbitrators, or any of them, to this defendant or his attorney, or either of them, to

appoint a time for proceeding upon the said arbitration, except as is hereinafter mentioned, or that he this defendant, or they the said arbitrators, or any of them, did, at any time or times, except as is hereinbefore and hereinafter mentioned, appoint any time for that purpose, or that this defendant did decline to appoint a time of meeting, or refuse to attend at the time appointed, or pretend that it would be inconvenient to him, or not suit him to attend at the time or times appointed, except as hereinbefore and hereinafter mentioned; and this defendant admits that the said E. M. did, at the time in the said bill mentioned, write and send a letter, bearing date the day of to Mr. M. the complainant's attorney, to the effect in the said bill set forth; and this defendant saith he believes it to be true that the said Mr. M. did write a letter to this defendant's attorney, of such date, purport, and effect as is in the said bill set forth, and that this defendant's attorney did receive the same, and did not return any answer thereto, and that the said Mr. B.'s clerk did, at the time in the said bill mentioned, apply to this defendant's attorney for an answer to the said letter, and that this defendant's said attorney referred him to this defendant, but this defendant denies that he this defendant ever received any such letter bearing date on or about the day of or the day following, as is in the said bill mentioned; and this defendant saith he admits that the said Mr. B.'s clerk did, on or about the day of apply to this defendant and request him to fix a time between that day and the Saturday following (being the of ) for proceeding upon the said arbitration; and that this defendant thereupon told the

said clerk, as the truth was, that several persons, and among others S. C. who this defendant believed would be very material witnesses for him, were then from home, and that for that reason he could not appoint any time of meeting for proceeding upon the said arbitration, and he therefore did not appoint any day for that purpose: And this defendant, further answering, saith he believes the said E. M. and T. C. did on the day of subscribe their names to such writing as is in the said bill in that behalf mentioned to be dated on that day, and that a copy thereof was delivered to this defendant on the day of and this defendant believes that another copy was delivered on the same day to J. S. and that on the same day notice of the said appointment was given to the said complainant; and this defendant believes the said E. M. and T. C. did on the day of attend at the house of P. G. in the said bill mentioned, for the purpose of proceeding upon the said arbitration, and that the said last-mentioned arbitrators were there, attended by the complainant and his attorney Mr. B. but whether by any other person or persons as a witness or witnesses this defendant doth not know nor can set forth; but this defendant hath heard, and believes, that no witness or witnesses was or were produced to be examined on behalf of the said complainant other than and besides the said Mr. B.— but this defendant denies that the said last-mentioned arbitrators continued at the house of the said P. G. from the morning of the said day of till eight or nine o'clock in the evening of the same day, for this defendant saith he hath heard and believes the said last-mentioned arbitrators did not meet till the after-

noon of the said day of and that they left the place appointed for meeting about six or seven o'clock in the evening; and this defendant admits that he having at the time aforesaid informed Mr. B.'s clerk that his witnesses were not at home, neither he nor any person on his behalf did attend the said arbitrators, nor send them any message or excuse; and this defendant saith he hath heard and believes that the said J. S. did not attend at the said meeting; and this defendant, further answering, saith that about five o'clock in the evening of the said day of (as he hath heard and believes) and not at or about eight or nine o'clock, as is in the said bill in that behalf alleged, the said E. M. and T. C. did hear the testimony of the said Mr. B. on the behalf of the said complainant, touching the matters so referred to them and the said J. S. as aforesaid; and this defendant denies that he hath ever heard, save by the said bill, or that he believes, that the said E. M. and T. C. or either of them did express themselves or himself in such or the like manner as is in the said bill mentioned in respect of the testimony of Mr. B. nor does this defendant know, nor hath he ever heard, whether the said E. M. and T. C. or either of them, were or was informed that the said complainant had other witnesses whom it was meant or intended to examine before the said arbitrators in case they were not satisfied with Mr. B.'s evidence, or if this defendant had made any defence before the said arbitrators which might have rendered it necessary to examine them, or to any such or the like effect; but this defendant believes that the said arbitrators did not, nor did either of them, ever give the said complainant or the said Mr. B. his attorney, to understand

that they were satisfied with his evidence, for on the contrary this defendant hath heard and believes that the said arbitrators declared to the said complainant or his attorney, or that the said complainant or his attorney were or was given to understand, and did understand, that the said arbitrators intended, at some future time, to examine this defendant's witnesses, but what other observation or remark upon the testimony of the said Mr. B. the said arbitrators made this defendant doth not know nor can set forth; and this defendant saith he doth not know nor hath he ever heard, save by the said bill, that such observation as in the said bill is mentioned, or any observation to that or the like effect, was ever made by the said Mr. B. to the said arbitrators; but this defendant saith that if any such observation was made this defendant believes that the said arbitrators did not, nor did either of them, assent thereto, or in any manner acquiesce in the propriety thereof: And this defendant denies that the said E. M. and T. C. or either of them, did, to the knowledge or belief of this defendant, before they left the said house, or at any other time, declare or express themselves to the said complainant, or the said Mr. B. in the manner in the said bill set forth, or to that or the like effect, or did in any manner express or declare their final resolution, or make any declaration, save and except as to their intent of examining this defendant's witnesses at some future time, and save and except that they might declare that if this defendant did not produce his evidence, they would make an award before the end of the time limited by the said arbitration bonds, without hearing them: And this defendant, further answering, saith he doth not know, save and

except as is hereinbefore and hereinafter set forth, what passed at the said meeting on the day of nor does he believe that the said E. M. and T. C. at that time came to any other resolution touching the matters referred to them than such as is hereinbefore set forth; and this defendant saith he doth not believe that, from what passed at the said meeting, the said complainant or his attorney did conclude, or were warranted in concluding, that it would not be necessary for the said complainant or his said attorney, or the said complainant's witnesses (in case he had any who were not then examined) to attend the said arbitrators again on the business of the said reference, or that the said E. M. and T. C. would have made an award in the complainant's favour; for this defendant saith, he hath heard and believes that the said last-mentioned arbitrators informed the said complainant or his attorney, or the said complainant or his said attorney in some manner well understood, from the said last-mentioned arbitrators, that if this defendant produced his witnesses at a future time, they would proceed to hear them: And this defendant admits that the said three arbitrators E. M.—T. C. and J. S. did on the day of meet together, at the house of the said P. G. at, &c. aforesaid, and that they were there attended by this defendant and his attorney, and by J. K.—S. C. and J. A. as witnesses on the part of this defendant; and that the said arbitrators did on the afternoon of the said day of at about eight o'clock, make and execute an award in writing of such date, purport and effect as is hereinbefore set forth; but for his greater certainty he craves leave to refer thereto when it shall be produced to this honourable court; and he

admits that the said meeting was not attended by the said complainant or his attorney, but the said meeting was attended by T. M. the son-in-law of the said complainant, who, as this defendant hath heard and believes, attended the said meeting on the behalf, and at the request, of the said complainant; and this defendant hath heard and believes that the said T. M. informed the said arbitrators that he attended them by the desire of the said complainant, and on his behalf: And this defendant, further answering, saith that he hath heard and believes that on the day of the said E. M. did send a message to the said complainant, by a person of the name of E. R. to inform him the said complainant that his attendance was required the next day at, &c. as the said arbitrators intended to meet on that day upon the said reference, and that the said E. R. delivered the said message to the servant of the said complainant; and that this defendant saith he verily believes the said message was duly delivered by the said complainant's servant to him the said complainant, and that the said T. M. attended at the said meeting on the behalf of the said complainant in consequence of such message; and this defendant saith he doth not know that any other notice was given to the said complainant of the said last-mentioned meeting than as hereinbefore is mentioned; and this defendant saith he believes that the said J. S. was never attended by the said complainant or his attorney, and never heard or examined any allegations, evidence, or witness on behalf of the said complainant on the said reference except the said T. M. or what he heard from the said other arbitrators, or from the said complainant, in conversation upon former occasions,

when they were not expressly met for the purpose of taking the said matter into consideration as arbitrators, upon which occasions, or some of them, as this defendant hath heard and believes, the said complainant admitted to the said J. S. the justice of this defendant's defence against his demands; and this defendant saith he hath heard and believes that the said Mr. B. at the time when he was examined before the said E. M. and T. C. on the said day of as hereinbefore is mentioned, delivered a paper in writing to the said E. M. and T. C. (wherein the said Mr. B. is alone mentioned as the witness for the said complainant), containing the case of the said complainant, and the whole of his the said Mr. B.'s evidence which he had so given as aforesaid, and that the said Mr. B. so delivered the said paper to the said arbitrators, in order that they might shew the same to the said J. S. and did, at the same time, declare, that he was the only witness on the part of the said complainant; and this defendant hath heard and believes that the said E. M. and T. C. did deliver the said paper containing the said case and testimony of the said Mr. B. to the said J. S. and that the same was read and considered by the said J. S. before the said award was made by the said arbitrators; and this defendant saith he verily believes that the said E. M. and T. C. were on the said day of and that all the said arbitrators were on the said day of ready and desirous to hear any other witnesses that the said complainant or his attorney, or the said T. M. should produce on behalf of the said complainant, touching the matter in reference; and this defendant saith he hath heard and believes that the said E. M. and T. C. having on the day of

when they informed the said Mr. B. of their intending to hear this defendant's evidence on some future day, understood from the said Mr. B. that his attendance on any future occasion could be of no consequence, the said arbitrators did not conceive that there was any occasion to defer making their award, and thereupon proceeded to make the same; and this defendant denies that the said award was the effect of any collusion between the said arbitrators, or any of them, and this defendant; or of their, or any of their, partiality for him; or that the same was obtained by him from them, or any of them, by any corrupt, undue, or improper means; or that the said arbitrators, or any of them, did, in the business of the said reference, in any respect act improperly or misconduct themselves or himself: And this defendant saith that the said arbitrators, at their said last-mentioned meeting, did take into consideration the sum of 3*l.* 3*s.* in the said bill mentioned, and determined upon the same in making their said award; and this defendant denies that the said award is wholly, or in any respect, unfair or unjust; and this defendant insists that it ought to be performed: And this defendant, further answering, saith he believes that such notice of the meeting of the said arbitrators on the day of was given to the said complainant on the day of as is hereinbefore in that behalf mentioned, but at what time of the day, or where in particular such notice was given, or what was the substance of such notice, or what was the name of the servant of the said complainant, to whom the said notice was delivered by the said T. R. and who as the said defendant believes delivered the same to the said complainant, this defendant doth not

know, nor can set forth in any other manner than he hath already set forth the same, but this defendant believes that no other notice was given to the said complainant, nor was any notice of the said meeting given to the said Mr. B. unless the same was given to him by the said complainant: And this defendant saith he believes the notice was proper in point of time, and that the complainant, his attorney, witness, or witnesses might have attended, and that such notice was not unreasonable, particularly as the said complainant's witnesses, or such of them as he chose to produce, had been already examined, and the said Mr. B. had before declined any further attendance, as is hereinbefore set forth; that there was no necessity for the attendance of the said Mr. B. or of any witnesses on the part of the complainant, and so the said complainant seemed to admit, as the said T. M. who attended on behalf of the said complainant, did not make any objection to the said arbitrators proceeding to make their award, on account of such notice being given; nor does this defendant believe that the said complainant had any witness or witnesses to produce other than and besides the said Mr. B. and T. M. and this defendant admits that the respective places of residence of the said complainant and Mr. B. are at such respective distances from, &c. as are in the said bill set forth, and for any thing he knows to the contrary, it may be true that Mr. B. was during some part of the day of at, &c. in the said bill mentioned, on some business in the way of his profession, and that, &c. is 18 miles distance from, &c. but he doth not know during what part of the day he was there, nor does he believe that the said arbitrators or any of them were apprized that the said

Mr. B. was at or engaged at, &c. as aforesaid, before they made or executed their award: And this defendant admits that T. M. did attend as is hereinbefore set forth, as a witness for the complainant, but this defendant believes that the said T. M. was not present at the examination of any witness or witnesses, the said arbitrators having agreed that no person, except the witness who was under examination, should be in the room with them during the examination of any of the witnesses, and that therefore, after they had asked the said T. M. such questions as they thought proper, they desired him to depart from the room wherein they then were; and this defendant admits that the said T. M.'s then place of residence was about six or seven miles distant from, &c. and that he was asked some questions by the said arbitrators, or some of them, at their said meeting on the day of and this defendant saith he believes that the said T. M. was asked the proper questions, and that he was fully and properly examined on the complainant's behalf, but that no person was present to examine him on the said complainant's behalf, except the said arbitrators, they having determined that no person should be present with them except the witness, as is hereinbefore mentioned: And this defendant denies that the said T. M. did attend the said arbitrators in consequence of a request sent him by the said E. M. as this defendant hath heard and believes that the said T. M. declared that he attended at the request of his father-in-law the complainant: And this defendant, further answering, saith that the said arbitrators, on the said day of heard on the part of this defendant the evidence of J. K.—S. C. and J. A. and also the testimony of

W. F. which had been previously taken by the said J. S. and was related by him, and also the declaration made by the said complainant to the said J. S.—and that such evidence and testimony did warrant the said arbitrators in making their said award; and that neither they, nor any of them, were influenced by partiality for this defendant, nor by any undue or improper motives: And this defendant denies all and all manner of unlawful combination, &c.[1]

S. R.

[1] These are the pleadings in the case cited p. 374.

# INDEX.


ACCOUNT,
Debt on arrears of, cannot be referred alone, 51.
Whether together or with other things, 54.
Action of, may be referred, 52.

ACQUIESCENCE—See TIME.

ADMINISTRATOR—See EXECUTOR.

AFFIDAVIT OF SUBMISSION,
Witness to submission may be compelled to make, 23, 24.
What is necessary to ground the application, 24.
To ground an attachment, 313, 314, 317.

AGENT—See ATTORNEY.

AGREEMENT,
To refer, no bar to an Action, 14.
nor to bill of discovery, 19, 20.

AVERMENT,
Uncertainty in an award, how far helped by, 195—197, 201—205.
Of tender and refusal, 301.
Of performance, 301, 302.

AWARD,
What, 6.
Who shall be bound by, 42.
See ATTORNEY, BANKRUPT, PARTIES, PARTNERS, PRINCIPAL.
Who shall take advantage of, 48.
See BANKRUPT, PARTIES, PARTNERS.
In writing,
must be on a suitable stamp, 139.
When to be made, 137, 138.
Must be according to the submission, 140.
not beyond the submission, 141.
Out of the submission, no bar in equity, 167, 168.
What shall be construed to be within or beyond the submission, 141, 142, 145—148, 150, 170, 236, 237, 238.
May be of money by way of recompense, 143.
but not of a thing collateral, 143, 144, 145.
See COSTS.
How far it may extend to strangers, 156—160, 188.
May extend to persons in contemplation of the submission, though not directly parties to it, 160—164, 166.
May comprehend strangers, as mere instruments, 166, 167.
See STRANGER.
Must not be of parcel only of the things submitted, 171.
This rule how to be limited, 172, 173—176, 181.
how construed, when the submission is specific, 176, 181, 182.

AWARD,
Must not be of parcel only of the things submitted.
This rule how construed in a court of equity, 183. 184.
when the submission is general, 176, 177, 179.
When the submission is general, the award is no bar to an action for a cause subsisting at the time, but not laid before the arbitrator, 179, 180.
How far it must extend to all parties, 182, 183.
Must not order any thing illegal, 184.
How far it must pursue the rules of law, 351.
Must not be of a thing impossible, 185, 186, 191.
Distinction in this respect between a bond and an award, 187.
Must be reasonable, 189—191.
Must be advantageous, 186, 187, 191, 192.
Whether it must give a recompense, 193.
Must be certain, 123, 124, 128, 194, 196, 197.
but certainty to a common intent sufficient, 132.
What shall be considered as sufficiently certain, 197—203.
Must not plainly err either in law or fact in Pennsylvania, 380, et seq.
See AVERMENT.
May be conditional, 203.
in the alternative, 203.
with a penalty, 203.
Must not be repugnant, 217.
Must be final, 123, 124, 208.
What shall be considered as final or not, 210—215.
Whether and how far it must be mutual, 218—228, 259—261.
How construed, 228.
formerly with great strictness, 228, 229.
now more liberally, 230, 231.
so that it may, if possible, be supported, 233—243.

AWARD,
When good in part, though void in part, 243—246, 254—261.
When void for the whole, 246—250.
Its form, 261.
When it may be verbal, 261, 262.
See PLEADING.
When it must be in writing, 262.
When under hand and seal, 262.
Whether it must be by deed indented, 263
Whether expressed to be of and upon the premises, 263.
Performance of it, 264—271.
See PERFORMANCE.
Breach of it, 271—275.
How set forth in the declaration, 284, 288, 289.
in the replication, 285, 286.
Where it needs not be set forth, 297, 298.
What may be pleaded to an action brought to enforce it, 298.
May be set forth by the defendant, 301.
Where it may be referred back to the same arbitrator, 359.
Not enforced in equity against the defendant, if the plaintiff has not performed his part, 323—326.
For what causes set aside, 346—360.
How pleaded, and in what cases, in bar of an action, 381—393.
How far *exceptions* can be taken to an award in a court of equity as to a Master's report, 343—345.
How far pleaded to a bill filed to set it aside, 360—380.

BANKRUPT,
Assignees of, how far they may submit a dispute in his right, 41.

BANKRUPT,
Assignees of, when bound by his submission, 48.
may take advantage of award made in his favour, 49.

BILL DISMISSED,
Award that bill shall be dismissed, final, 211.

BREACH,
Of submission, 30—34.
by express revocation, 30, 31.
by implication, 30, 33.
Of the award, what shall be, 19, 271—275.
Where several may be alleged, 279, 280.
See page 297.
How assigned, 280, 292—296.

COSTS,
Of the reference, whether within the power of the arbitrator, 151, 152, 394—398.
Cannot be referred to be taxed by the officer of the court, 135.
Of suit, on a reference at nisi prius, 135.
may be referred to the officer of the court, 135.
but not to any other person, 136.
In an inferior court, must be ascertained by the arbitrator himself, 137.
To abide the event, how construed, 153—155.
Where nothing awarded as to costs, each party shall pay his own, 213.

COVENANT,
Award of, how far final, 214.

DATE,
Of the award, 201.
May be averred, 201.
Whether necessary to be alleged in pleading, 285.

DEBT,
On bond, where it may or may not be referred, 51, 54.
On simple contract, 52.
On arrears of rent, 54.
Action of, on submission bond, 280.
Order of pleading in, 280, 281, 282.
What necessary to be stated in, 283, 284, 285, 286, 287.
On the award itself, 288.
What necessary to be set forth in, 288, 289.
Manner of pleading in, 289, 290.

DEED,
Where a demand arising by, may or may not be referred, 53.

DELEGATION,
Of authority, what shall be, 129, 133, 134.
what not, 137.
Of a ministerial act, 129, 134.
Of a judicial act, 128, 136.
See COSTS.

DELIVERY,
Of an award, where it may be by parol, 116, 117.
must be to the *whole* party on each side, 116.

DEPARTURE,
In pleading, 282, 294, 300, 302, 303, 309, 310.

DISCONTINUANCE,
Award of, considered as final, 210, 211.

EVENT,
How construed, 153.

EXECUTOR,
May submit a dispute in right of his testator, 39.
But accountable for deficiency, where the award gives less than his due, 40.
Submission by, when and when not an admission of assets, 40.
Bound by an award on submission of his testator, 48.
May take advantage of ditto, 49.

FREEHOLD,
How far the subject of reference, 55—61.

FEME COVERT—See MARRIED WOMAN.

HUSBAND,
Where his submission shall or shall not bind his wife, 46, 47.

INFANT,
Cannot be party to a submission, 35.
How far another submitting for him shall be bound by an award against him, 36—39.
Cannot be an arbitrator, 70.

ITA QUOD,
Clause of, its operation, 170, 175, 177, 182, 183, 207, 236—238, 259.

JUDGMENT,
Where damages ascertained by, may, or may not be referred, 51, 54.

JUDICIAL ACT,
What shall be, 136.

LAND.—See FREEHOLD.

MARRIAGE,
An implied revocation of submission, 30, 32.

MARRIED WOMAN,
Cannot submit, 35.
Where and where not bound by her husband's submission, 46, 47.
Cannot be an arbitratrix, 70.

LIMITATIONS,
Statute of, cannot be pleaded to debt on award under hand and seal, 298, 299.

MINISTERIAL ACT,
What shall be, 125, 127.

MONEY,
An award of, in satisfaction, 143.
Awarded without time limited, must be paid within a reasonable time, 205.

NON SUIT,
Award of, not final, 208—210.

ORDER,
Of reference at nisi prius, by whom to be drawn up, 95.
To enlarge the time, how obtained, 96, 97.
By whom drawn up, 97.

PARTIES,
To the submission, who may be, 35.
who shall be considered as, 43.
Alone bound by the award, 42.
Where each is bound to perform the whole, 44, 45.
How far the award must extend to all, 182, 183.
Bound where they submit for others, 42.

See INFANT, MARRIED WOMAN, BANKRUPT, EXECUTOR.

PARTITION,
Whether it can be by award, 57.

PARTNERS,
Covenant to submit by, no bar to an action, 12—14.
to a bill for a discovery, 14—20.
One, not bound by the submission of another, 42.
Where they may recover against each other a portion of a sum awarded, 44.
Partnership may be awarded to be dissolved, 149.

PERFORMANCE,
What shall be, 264—275.
By attorney, 265.
Not required to be literal, 267.
After considerable time, 270.
How compelled, 276—326.
See REMEDY.
When necessary to be alleged in pleading, 287—302.
How to be alleged by the defendant, 301—302, 303.

PERSONAL WRONG,
What kind of, cannot be referred, 63—68.

PLEADING, 179, 180.
Difference of, in an action on the award, and in an action on the submission bond, 288, 290.
in an action on a verbal, and on a written award, 291.
By the plaintiff, when the award is partially set forth by the defendant, 303.
Order of, 280, 289, 291, 293.

PREMISES,
Submission, with a clause "of and upon the premises," 175, 177, 178, 206, 207.

PRINCIPAL,
Authorising agent to submit, bound by the award, 42, 43, 165.
Bound by his attorney's consent to submit at nisi prius, 45.
Whether bound by his solicitor's consent in Chancery, 46.

REFERENCE,
Order of, at nisi prius, by whom to be drawn up, 95.
See SUBJECT OF REFERENCE.

REJOINDER,
When the defendant having pleaded "no award" may rejoin, without departure, 300.

RELEASE, 155, 170, 178, 192, 198, 220, 238—243, 250, 259.

RELIEF,
Against an award.
By objections appearing on the face of it, 327.
Can only be had in a court of law, 327, 350.
On shewing cause against an attachment, 342.
But cannot be made the subject of a distinct motion to set aside the award, when the submission is by rule of court under the statute, 342.

RELIEF,
On extrinsic circumstances, 327, 328.
Cannot be had, by way of defence at trial, 328.
Nor by shewing cause against an attachment, 346.
But may be had by bill in equity, 329.
In what cases, 333—339, 347, 348, 349, 350.
On a submission by order of Nisi Prius, or according to the statute, may be had by specific application to the court, of which it has been made a rule, 340.
Within what time such application must be made, 341.
How obtained in Pennsylvania and for what causes, 380 a. et seq.

REMEDY,
On an award.
By action of assumpsit, 277—280.
See ASSUMPSIT.
By debt on the submission bond, 280—288.
By debt on the award itself, 288—291.
See DEBT—PLEADING.
By attachment, 311—318.
See ATTACHMENT.
By bill in equity, 318—326.
By judgment and execution in Pennsylvania, 326 a.

REQUEST,
When necessary to be stated in pleading, 279, 295.

RESERVATION,
Of authority, what shall be, 123.
Of a ministerial act, 125.
Of a judicial act, 125.

RETRAXIT,
Award of, final, 211.

REVOCATION,
Of the submission, before award made, 29, 30.
How it may be made, 30.
Express and implied, 30.
Effects of, 29—31.
Where submission is by bond or by parol, 31, 32.
In what cases a breach, 33.
How far no breach, where no time is limited for making the award, 96.
Replied to the plea of "no award," 310.
Of rescinding the rule in Pennsylvania, 34 e.

STRANGER,
To the submission, 156, 188.
Award to him void, 156.
of a thing to be done by him void, 156—159.
Distinction between an act to be done *by* and *to*, 160.
Payments of money to him, 158, 159.
His rights not affected by an award, 169.

SUBJECT OF REFERENCE,
What things may be submitted, 50—69.
Must be a thing uncertain, 50—53.

SUBMISSION,
What, 6.
PARTIES to it—See PARTIES.
How it shall be made, 8.
By the act of the parties merely, 8.
Verbal, 10, 11.

SUBMISSION,
In writing, 10.
Must be on stamped paper, 11.
By mutual bonds, 11, 12.
By bond to a third person, 12.
By other persons than the parties themselves, 12.
Not necessary that it should appear of how many persons the parties consist, 12.
By indenture with mutual covenants, 12.
When it must be by deed, 54—62.
By the act of the parties with the intervention of a court, 8.
By order of nisi prius, 21.
Proceedings thereon, 26.
Made a rule of the court out of which the record issued, 21.
Made a rule of another court, 23.
Distinction as to the order of words of reference, 149, 150.
By st. 9 and 10 W. 3. c. 15. 21.
By rule of court in Pennsylvania, under act of 1705, 34.
In what cases rule granted, 34 a.
By act of assembly of 1806, 34 g.

See AGREEMENT.

Its extent, 26.
How construed, 26, 27.
When there is a repugnancy in the words, 29.
To be construed liberally, 78—104.
What acts shall amount to a breach of, 33, 34.

See REVOCATION.

General, 172, 176.
Particular, 172, 176.
Misrecital of, shall not avoid the award, 235.
How stated in pleading, 276, 277, 278.
When it may be pleaded to an action on the original cause, 389.

TIME,
For making the award, 96.
How prolonged, 96, 97.
After prolongation of, no action will lie on the original submission bond, 311.
After long acquiescence in an award, a court of equity will prevent its being impeached at law, 322, 323.

TRESPASS,
May be referred, 53.

UMPIRAGE,
What, 6.
See AWARD.

UMPIRE,
Definition of, 6, 75.
May be nominated by the parties, 75, 77.
By the arbitrators, 75, 77.
Before the expiration of the time limited to themselves, 82—87.
Or after, if not restrained by the submission, 88.
Not by throwing cross and pyle, 76, 346.
When his authority begins, 77, 78.
When he may make his umpirage before the expiration of the time limited to the arbitrators, 78, 82, 88.
Whether in such a case it be necessary to allege that the arbitrators renounced their authority, 91.
One being nominated by arbitrators and refusing, they may appoint another, unless restrained, &c. 91—94.
How far he may proceed on the report of the arbitrators, 101, 102. See note (*f*) 103.
When he may join with the arbitrators, 104, 105.
Clause of "ita quod," extends to him, 175.

UNCERTAINTY—See AVERMENT.

VERDICT for security, 314.

WITNESS to SUBMISSION,
May be compelled to make affidavit, 23, 24.

WOMAN,
May be an arbitratrix, 71.

FINIS.

DB AKZ WGs
A treatise on the law of award
Stanford Law Library
3 6105 044 229 578